Con Law I Blog Posts

Masks, Liberty, and Personhood

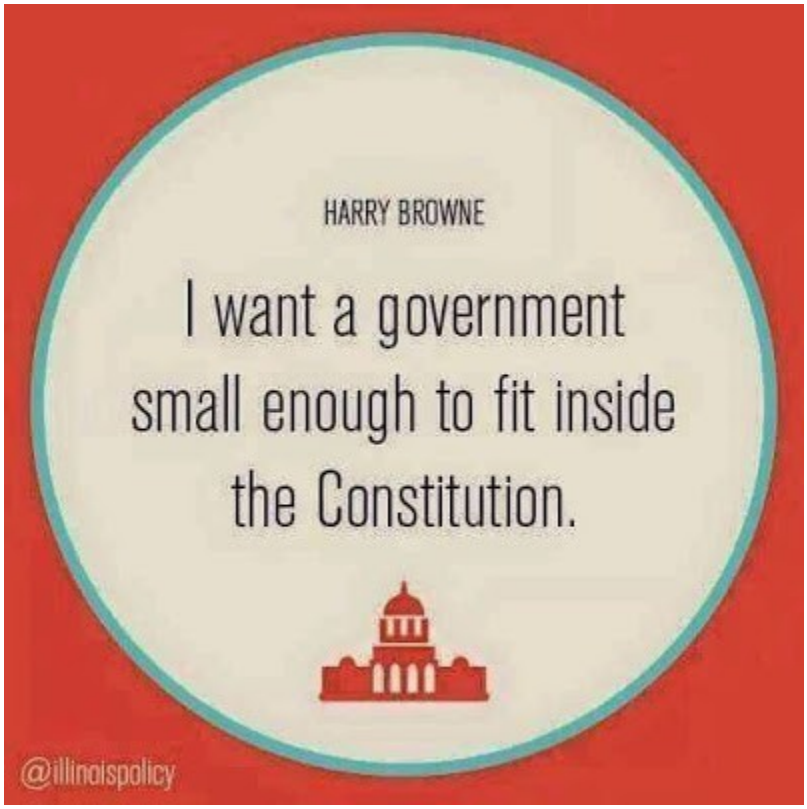
David Marcus has this article.

And here is a powerful quotation:

One way to describe societies that decide to scrub away individual liberty is faceless; people are identical cogs without unique features. Here we move from the symbolic to the literal as people hide their faces from the world. The most important thing about these people is now that piece of fabric and the compliance it indicates. There will be no smiling.

The masks of the law are also used to conceal the humanity of those the law wishes to treat harshly. Slaves were masked as "property" to conceal their humanity. Unborn babies are masked as "potential lives" by Roe v Wade and the abortion liberty. Masks--whether physical or legal--conceal the face (and thus the humanity and individual personhood) of the person behind the mask.

Con Law I Fall 2020 Syllabus



"Studying the Constitution has some of the same intellectual delight as reading Aristotle: it opens the mind on a subject of first importance." --Prof. Michael McConnell

Richard F. Duncan: Room 220 Law,
email:rduncan2@unl.edu; phone:472-6044

General Information: This class will meet on Monday & Tuesday from 1:30 PM until 2:55 PM. Notice these classes are for 85 minutes rather than 75 minutes and this allows us to cancel 3 classes during the semester without the need for a make-up.
Office Hours: I don't maintain specific office hours; I have an open door policy and I will be in the office regularly and welcome your visits or appointments.
Attendance Policy: Attendance is required.

Grading: Your grade for the course will be based 100% on your score on the Final Exam. The Final Exam will be a combination of objective (multiple

choice or true-false) questions as well as a number of short- or medium-length essay questions. The Final will be a closed book exam. Most of the essay questions will be ones you have encountered during the semester, whether in the blog, the assigned readings, or our class discussion.

Books: Varat & Amar, Constitutional Law (15th Edition)(Foundation Press 2017);
An Introduction to Constitutional Law: 100 Supreme Court Cases Everyone Should Know
by Randy E. Barnett and Josh Blackman; The Constitution: An Introduction Paperback – January 3, 2017 by Michael Stokes Paulsen & Luke Paulsen

You should read the Paulsen book in its entirety. Although we won't be discussing it in class as a general rule, it is an excellent introduction and overview of the entirety of constitutional law. The final exam will cover the Paulsen book. There will be a number of objective questions based upon the book, and I might also draft a short essay question based upon the book. You should try to read 30 to 40 pages a day. At this rate you can read through the book in about 2 weeks. Chapters 1-3 will be very helpful to your understanding of the issues we will be discussing in the first few weeks of the class.

I am also assigning the Barnett & Blackman book in its entirety. This book comes with video lectures on many cases, and you should watch these videos as we read the relevant cases.

Online Materials: Professor William Linder's Exploring Constitutional Law (Link)

For Fall 2020, students should be prepared for 1 full assignment for each class. I may make a few minor adjustments to these assignments as the course progresses to include cites to recent cases. Some classes will cover two assignments.
Be sure to check this blog every day for announcements, additional required and optional reading, and discussion of cases and issues raised in the reading. In fact, if you scroll down you will see that I have already posted a couple of items for our first class discussion.

First Thoughts

Consider this observation from Prof. Thomas R. Dye:

All governments, even democratic governments, are dangerous. They wield coercive power over the whole of society. They tax, penalize, punish, limit, confine, order, direct, and regulate. They seize property, restrict freedom, and even take lives, all under the claim of legitimacy.

The primary purpose of this course is to consider the many ways the Constitution establishes, limits and checks the power of government, and to appreciate the many ways the Constitution was designed to protect liberty, both through structural safeguards, such as separation of powers and federalism, as well as through specific protections of individual liberty.

Assignments: Fall 2020 (stay one entire assignment ahead for each class)

Here is a link to the text of the Constitution of the United States

1 Casebook p. 1-42
2 Casebook p. 43-66
3.Casebook p. 66-76; 80-100
4. Strauss article (link); Sollum Article (link)**;** Brennan Speech (link)**;** Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical (link); Wurman book.
5 Federalism and Equal Representation in the Senate and The Seventeenth Amendment: Read Suzanna Sherry, Our Unconstitutional Senate, 12 Constitutional Commentary 213-215 (1995) [available to print out at Hein Online]; Zwickie-Somin Debate on Repeal of the Seventeenth Amendment (link);Duncan, Electoral Votes, the Senate, and Article V: How the Architecture of the Constitution Promotes Federalism and Government by Consensus (link)
6 Casebook p. 103-149; *Wickard* (link)
7 Casebook p. 149-186
8 Casebook p.186-203; *South Dakota* v. *Dole* (link); Rotunda, The Spending Clause (link)
9 Casebook p. 221-247
10 Casebook p. 407-426; p.975-980
11 Casebook p. 426-46*3[In class, we will focus on McDonald (p. 441-61]*
12 Casebook p. 465-486: essay on Rehabilitating Lochner, by David Bernstein; 536-544
13 Casebook p. 583-627; My recent article, *Kermit Gosnell's Babies: Abortion, Infanticide and Looking Beyond the Masks of the Law*, is available at Digital Commons

14 Casebook p.628-648; *Obergefell* (p. 555-572); Duncan, Justice Scalia and the Rule of Law (link)
15 Casebook p. 663-700
16 Casebook p. 718-756
17 Casebook p. 756-767
18 Casebook p. 777-790
19 Casebook p. 807-822

End of My (Duncan's) Syllabus: Now For Something Completely Different

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ABA Requirements for Study: The ABA requires students to spend approximately two hours studying out of class for every hour spent in class. I should not have to even mention this—because you spend much more than 2 hours per class hour preparing for class and studying the materials—but to satisfy the powers that be in the ABA, I am hereby explicitly and emphatically requiring you to spend at least 2 hours studying this course for each one hour spent in class. I anticipate that you will spend the out-of-class time reading and re-reading class materials until you have mastered the issues and reasoning of the cases and problems, thinking rigorously about the materials, writing notes both before and after each class on the materials and issues assigned for that class and discussed in class, reading and thinking about the posts I write on our class blog and discussing materials with your classmates. Obey the ABA!

"Learning Outcomes"

Basically, I am old school about "learning outcomes." This is law school, not community college, so our major focus is on developing a sophisticated legal intellect by careful legal analysis of cases, statutes, and hypotheticals. Every day my job is to try to make the assignments and class discussions as challenging, clear, lucid and helpful as I can. Your job is to prepare for class, pay careful attention in class, participate in class discussions, and master the materials, questions, concepts, and issues we cover. Your individual outcomes depend in large part on how much effort you put into studying and class discussions. All of this being said, here are the "learning outcomes" for this course. If you work hard to master the course, you will:

(1) acquire a deep understanding of the US Constitution including judicial review, separation of powers, federalism, substantive due process, equal protection & much more.

(2) develop a deep understanding of Supreme Court case law interpreting the Constitution, including important dissenting and concurring opinions in landmark cases

(3) master the elements of the constitutional doctrines covered in the course

(4) be able to apply those doctrines to existing and new hypothetical circumstances

(5) make intelligent and persuasive legal arguments for different possible outcomes in those circumstances

(6) be able to explain how different interpretive philosophies or forms of constitutional argument might cause different Justices to reach different outcomes on the same circumstances (for example, how "originalist" and "living constitutionalist" Justices might approach issues that come before the Court)

(7) become familiar with the political forces and policy rationales that shape constitutional law

The primary means of assessing these outcomes is your self-assessment during and after each class. You should evaluate what you learned in each class when you review your notes and thoughts from each class.

Volunteering for discussion during class is also an excellent means of assessment.

The final exam is, as always, the more formal method of assessing many of these outcomes.

A Message From The Dean, A Message From The Dean

"If you think you will need any disability-related accommodation to succeed in this class, please contact Assistant Dean Marc Pearce and/or the Office of Services for Students with Disabilities as soon as possible for a confidential conversation."

Opening Statement--The Structural Protections of Liberty in the Constitution

> *The Constitution, though it dates from the founding of the Republic, has powerful meaning and vital relevance to our own times. The*

> *constitutional protections that this case involves are protections of structure. Structural protections—notably, the restraints imposed by federalism and separation of powers—are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment.* ***The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril.*** *Today's decision should have vindicated, should have taught, this truth; instead, our judgment today has disregarded it.* --Justice Scalia

Marbury: Should Chief Justice Marshall Have Recused Himself

Because he had personal knowledge of the facts of the case? Consider this excerpt from Van Alstyne, A Critical Guided to Marbury v. Madison, 1969 Duke L.J. 1, 8:

> Specifically, it would appear that Marshall should have recused himself in view of his substantial involvement in the background of this controversy....Proof of the status of Marbury's commission not only involved circumstances within the Chief Justice's personal knowledge, it was furnished in the Supreme Court by Marshall's own younger brother who had been with him in his office when, as Secretary of State, he had made out the commissions.

Van Alstyne's article is a good read for those interested in an in depth account of *Marbury*.

Marbury and "Constiutional Review"

In The Federalist No. 78, Alexander Hamilton described the federal courts as follows: “[T]he judiciary, from the nature of its functions, will always be

the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure." Almost 200 years later, in his classic book entitled The Least Dangerous Branch, Alexander Bickel had the following response: "The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known. The power which distinguishes the Supreme Court of the United States is that of constitutional review of actions of the other branches of government, federal and state."

Separation of Powers:Checks and Balances

I just read a wonderful description of our system of checks and balances that I would like to share with you:

> *We have, at least in the original design of the Constitution, a system that has no directional pull at all. Each distinct institution of government, from the President, to the Senate, to the House, is subject to different rules, all of which, in combination, are designed to create multiple obstacles to the enactment of laws.*

Richard A. Epstein, 34 Harv. J. L & Pub. Policy 819 (2011).

Consider this passage from the Paulsen book (24):

"[W]e look at four cornerstones of the Constitution's overall design: first, the fact that it is a written constitution; second, its essentially republican character; third, the carefully crafted separation of powers of the branches of the national government; and fourth, the distinctive feature of federalism, dividing power between the national government and the states."

The Tenth Amendment was designed to underscore the fact that the Federal Government was one of strictly limited powers--it had only those powers enumerated in the Constitution, and no others. Here is the text of the 10th Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Does the fact that the Federal Government is one of only enumerated powers, as opposed to plenary power, protect liberty? If so, how so? By

"avoiding too great a concentration of power in any one set of hands?" By giving citizens the right to choose between competing baskets of government?

Now consider Madison on Federal Power in Federalist 45:

> The **powers delegated by the proposed Constitution to the federal government, are few and defined**. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. **The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.**

Is this how things worked out?

"The least dangerous branch"

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Almost 200 years later, however, in his classic book entitled *The Least Dangerous Branch*, Alexander Bickel provided the following update: "The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known. The power which distinguishes the Supreme Court of the United States is that of

constitutional review of actions of the other branches of government, federal and state."

Judge Richard Posner calls this power of the Court "Zeus's Thunderbolt," because it is a god-like power wielded by an unelected body of lawyers.

Which provision in the Constitution gives federal courts the power of "constitutional review?"
One commentator refers to the doctrine of judicial review as "an irreversible reality of American law." What do you think he meant by this?

Finally, consider this statement by Justice Jackson in *Brown* v. *Allen*, 344 U.S. 443, 540 (1953):

"We are not final because we are infallible, but we are infallible only because we are final."

Originalism and Interpreting 18th Century Recipes

"Interpreting the Constitution is no more difficult, and no different in principle, than interpreting a late-eighteenth-century recipe for fried chicken." --Gary Lawson

But suppose you have an old recipe for, say, Great Grandma's egg nog, and it says something like this:

"Add nutmeg to taste."

Some would argue that such a "majestic generality" defies original meaning originalism and requires the modern reader to interpret the phrase as a living, evolving concept.

When someone asked me about this once, I replied as follows:

But nutmeg means nutmeg (as nutmeg was understood at the time the recipe was published). Maybe a little more for you, a little less for me. Maybe a pinch. Maybe two pinches. But certainly not a handful. But if you substitute cinnamon for nutmeg, you are amending the recipe, not following it. Okay so long as 3/4 of states ratify new recipe.

Suppose modern language no longer refers to "nutmeg" as nutmeg." Now

nutmeg means "ground up dried fish guts" and the spice that used to be known as nutmeg is now called "ground Myristica."

If we are to be faithful to Great Grandma's recipe, what should we do about "add nutmeg to taste" when following her egg nog recipe today? Add ground fish guts? Or ground Myristica?

Prof. Randy Barnett on Originalism

I am assigning this talk on originalism by Randy Barnett, one of the leading originalists scholars. This is a talk I thought about listening to together in class, but it is a wonderful way to keep the learning going on line. Here is the link (and please try to write at least 1 comment after you view it):

Prof. Randy Barnett on Originalism

Who Protects Us From Our Guardians?

Assuming that judicial review of democratically-enacted laws is here to stay–and one commentator refers to the doctrine of judicial review as “an irreversible reality of American law”–how are we to protect ourselves from an abuse of judicial review?

If the Court is our Guardian against Legislative Tyranny, who (or what) is our Guardian against Judicial Tyranny?

Does the fact that the Constitution is a written Constitution protect us, because the Court is bound by the Written Constitution?

The Election of 1800

Hamilton The Election of 1800

Can the Supreme Court Violate the Constitution?

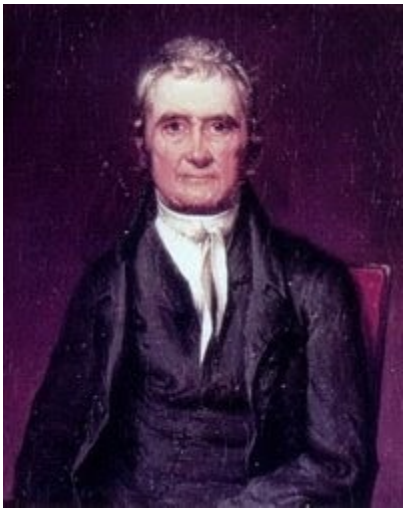
We have a written constitution and it binds all baranches of gevernment. Consider this excerpt from Paulsen & Paulsen (p. 26):

> No branch of the federal government--not the Congress, not the President, not even the Supreme Court--can legitimately act in ways contrary to the words of the Constitution...Thus, the idea of a written constitution is closely tied to the idea of *constitutional* supremacy. In America, no branch of government is supreme...The Constitution is supreme....Departures from these limitations are *unconstitutional*.

It is the text of the Written Constitution that has been ratified by we the people in the states. Supreme Court decisions are only legitimate if they are faithful applications of the constitutional text.

Something to think about as we study *Marbury*.

Marbury v. Madison: The Lineups



John Marshall

Checks and Balances on Judicial Power

We have been discussing *Marbury* v. *Madison* and the power of Constitutional Review, i.e., the power of the Supreme Court to declare legislation unconstitutional (and thus invalid).

If unchecked, this is an extraordinary power and could lead to what one commentator calls “government by an unelected judiciary.”

We’ve been discussing some of the checks on this extraordinary power. What are some of those checks?

1. Constitutional Amendment (2/3 of both Houses plus ratification by 3/4 of the States). See Art. V.

2. Impeachment (for high Crimes and Misdemeanors). Art. II, § 4.

3. New appointments to the Court bring fresh blood and help assure that the Court identifies with the changing needs and concerns of the times.

4. Doctrine of Judicial Restraint, i.e., the view that the written Constitution has an historical meaning that binds the judiciary (i.e., judges should

interpret and apply law not make law).

5. McCardle and "jurisdiction stripping" legislation enacted by Congress as a check on judicial power.

Moreover, one proposal that has recently been made calls for a constitutional amendment permitting Congress to reverse – by a 2/3 vote or perhaps by a majority vote – any judicial decision declaring any state or federal law unconstitutional. What do you think of this proposal as a check on judicial supremacy?

Here is one I personally like – how about amending the Constitution to require, say, 7 votes on the Court to declare any law unconstitutional. This requires the Court to act by consensus before striking down legislation enacted through the democratic process.

Which Branch is the Authoritative Interpreter of the Constitution?

The Court has just decided *Plessy* v. *Ferguson*, which held that racially segregated public facilities were constitutional so long as the separate facilities were equal (e.g. the seats at the back of the bus are the same quality as those at the front of the bus).

Congress then passes a law that requires racial segregation in, say, public transportation. The President vetoes the law and, in his veto message, he says he did so because he believes that *Plessy* is wrong and, that no matter what the Court says, the Equal Protection Clause forbids racial segregation in public facilities. May the Court rescind the President's veto, because it was based on an erroneous interpretation of the Constitution? Or, at the very least, is the President guilty of irresponsible behavior for refusing to follow the Court's "authoritative" interpretation of the Constitution?

Now suppose Congress passes the law over the President's veto and the President announces that he will not enforce the law because he believes to do so would violate the rights of persons, like Rosa Parks, who choose to violate the law by sitting in "whites only" seats. Is the President's action unlawful or at least irresponsible? How would you advise the President?

Consider Prof. Van Alstyne's comments on this issue:

> *Marbury* does not mean, for example, that either Congress or the President need defer to Supreme Court interpretations of the

> Constitution so far as their own deliberations are concerned and so far as the efficacy of their power does not depend upon judicial co-operation. When a bill is under consideration, for example, Congress might conscientiously reject the bill believing the bill to be unconstitutional even assuming that the Court has provided no precedent for that belief and even assuming that the Court has upheld similar legislation adopted by an earlier Congress. Similarly, the President may veto the bill on the grounds of his own interpretation of the Constitution – whether or not it is the same as the Court's."

Marbury and the Judiciary Act of 1789

Here is the relevant text of the Judiciary Act of 1789:

> Sec. 13. That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party. And the trial of issues in fact in the Supreme Court in all actions at law against citizens of the United States shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states in the cases hereinafter specially provided for and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principle and usages of law, to any courts appointed, or persons holding office under the authority of the United States. . . .

Prof. Rotunda notes that when a statute has two possible constructions, one that would conflict with the Constitution and one which would not, "the Court will...construe the law to avoid the constitutional issue if such a construction is fairly possible."

Since it is possible to construe the reference to writs of mandamus in the Judiciary Act as having nothing to do with adding all mandamus litigation to the Court's original jurisdiction, the Court in *Marbury* could have interpreted it this way and dismissed for lack of jurisdiction without ever

reaching the constitutional issue.

But instead, the Court construed the statute as adding to the Court's original jurisdiction, which, in turn, raised the issue of whether the Judiciary Act was constitutional.

Make sure you understand this important move by the Court.

Here is how to think about it:

1. Does the Court have original jurisdiction to issue a writ of mandamus to Madison
2. Court interprets the Judiciary Act as granting original jurisdiction in mandamus cases
3. Thus, the issue becomes whether this is consistent with how the Constitution defines the scope of the Court's original jurisdiction
4. Here is the relevant language from Art. III, Sect.2:

> *In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party,* ***the Supreme Court shall have original jurisdiction****. In* ***all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction****, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.*

So is Marbury's suit against Madison within the scope of the Court's original jurisdiction as set forth by Art. III, Sect 2? What does the Court say? (see p. 30)

If the Court believes the Judiciary Act is unconstitutional (because it attempts to expand the maximu amount of the Court's original jurisdiction), must it nevertheless enforce the Judiciary Act and hear this case? Does the Court have power to declare an act of Congress unconstitutional and therefore void and not binding on the Court?

Marbury v. Madison: Takeaways

1. Since Marbury commenced his case in the Supreme Court of the United States, the issue was whether the Supreme Court had original jurisdiction to hear this case. If no original jurisdiction, then the case must be dismissed.

2. Be sure you understand how the Court interpreted (almost certainly misinterpreted) section 13 of the Judiciary Act as granting the Court original

jurisdiction to issue writs of mandamus. The Court's incorrect interpretation of section 13 is the key to understanding this case. Make sure you carefully read and re-read section 13 until you understand why the Court's interpretation was almost certainly incorrect.

3. Once the Court reads section 13 as giving the Court original jurisdiction to issue writs of mandamus, the constitutional issue becomes whether the Constitution limits the Court's original jurisdiction. That requires the Court to interpret Art. II, sect. 2, which provides:

> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Since Marbury is neither a foreign ambassador or foreign public minister or consul, nor a "state," the issue now is whether Congress can add new cases to the Supreme Court's original jurisdiction.

4. The Court interprets Art. III, sect. 2 as providing a ceiling on the Court's original jurisdiction (this much and no more). Thus, Congress may not pass laws expanding the Court's original jurisdiction.

5. Thus, section 13 of the Judiciary Act is inconsistent with Art, III, sect. 2 of the Constitution. And the issue becomes….

6. Does the Court have the power of judicial review, the power to declare a law enacted by Congress unconstitutional and thus void.

7. The Court concludes that it does indeed have the power to declare an Act of Congress unconstitutional (the power of judicial review) because it is bound by the written Constitution and "the constitution is superior to an ordinary act of the legislature." (casebook p. 31)

8. Notice that if the Court had correctly interpreted section 13 of the Judiciary Act, it could have reached the same result (dismissed for lack of original jurisdiction) without having to declare an Act of Congress unconstitutional. Properly understood, section 13 of the Judiciary Act does not expand the original jurisdiction of the Court and therefore is not in conflict with Art. III, sect. 2 of the Constitution.

9. Finally, notice that nothing in Art. III or anywhere else in the Written Constitution gives the Court the power of judicial review or to declare acts of federal or state laws or policies unconstitutional. This power was created by the Court itself in Marbury v. Madison. It is perhaps one reasonable interpretation of judicial power under Art. III, but the idea of judicial supremacy is not written into the text of the Constitution. Marbury is the most important decision in the history of the Supreme

Court because it is the source of the power that the Court has ever since exercised to review the constitutionality of legislative and executive laws, rules, and policies. As Chief Justice Marshall put it (casebook p. 31), "It is emphatically the province and duty of the judicial department to say what the law is." But notice he also said (casebook p. 33) that by the very nature of a "written constitution" it is essential "that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by the instrument." So query! Is a judicial decision repugnant to the Written Constitution void and thus not a valid precedent?

Marbury and Judicial Sovereignty Over the Constitution

Does Marbury v. Madison mean that when the Supreme Court's view of the Constitution differs from that of Congress or the President, the Supreme Court's view always prevails?

Let's take a hypothetical.

Suppose the Supreme Court decides *Plessy* v. *Ferguson* which held that racially segregated facilities were not unconstitutional (separate but equal decision).

Now suppose Congress passes a law that provides for racially segregated public facilities. The President vetoes this law on the ground that he believes the law is unconstitutional.

Is this permissible?

Now suppose a second hypo.

The hypo concerns abortion – now in *Roe* v. *Wade,* the Supreme Court held basically two things:

1. that an unborn child is not a "person" entitled to a right to life and equal protection under the Fourteenth Amendment; and

2. that a pregnant woman has a constitutional right to choose abortion for any reason.

That is the law according to the Supreme Court.

But let's suppose the President disagrees – suppose the President believes

that an unborn child is a “person” whose right to life is protected and that there is no constitutional right to abortion.

Does the Court’s view govern over the President’s view?

It depends.

If the President signs into law Congressional legislation outlawing most abortions, what result?

The Court will strike the law down as unconstitutional and *Marbury* v. *Madison* would support the Court’s power to invalidate this law.

Now, suppose a different piece of legislation – suppose Congress passes the so-called Freedom of Choice Act which codifies *Roe* v. *Wade* and expressly immunizes abortion against restrictions enacted by state legislatures. The bill reaches the President’s desk and the President vetoes the bill on the grounds that the law is unconstitutional because the unborn child is a person entitled to the right to life.

Is this veto unconstitutional?

Ex Parte McCardle

Suppose Congress enacts a statute that provides as follows:

1. The Supreme Court shall not have jurisdiction to review any case concerning recitation of the Pledge of Allegiance in the public schools; and

2. No inferior federal court shall have jurisdiction over any case concerning recitation of the Pledge of Allegiance in the public schools.

Notice this statute would have the effect of removing cases concerning the Pledge from the federal courts. Is this statute Constitutional?

Perhaps one way to think about "jurisdiction stripping" legislation is that it is a check on the vast power of the judiciary that gives the People, acting through their democratically-elected representatives in Congress, the ability to enact a vote of no confidence in the federal courts on certain

issues. In effect, this kind of legislation announces that the People would prefer that their Constitution (it is their Constitution, is it not?) be interpreted and safeguarded by state courts, rather than federal courts, concerning certain issues.

Is there any reason to think that federal judges are more intelligent or more ethical or less prone to judicial imperialism than are the men and women who serve on state courts? In a diverse nation that still reflects a great deal of regional difference, is there room for diverse interpretations of the Constitution? Or is there only one "correct" view (the one that has the votes of 5 Justices on the U.S. Supreme Court)?

On the other hand, some argue that legislation stripping the Court of jurisdiction is problematic because it undercuts the Supremacy Clause (Art. VI, paragraph 2) and undermines the uniformity of decisions throughout the United States on constitutional law (students in Mississippi have one establishment clause rule, students in New York have another). Do you understand these arguments for adopting a restrictive reading of *McCardle* and the exceptions clause?

McCardle: A Few Notes

The following notes have been taken from Van Alstyne, A Critical Guide to Ex Parte McCardle, 15 Arizona L. Rev. 229 (1973):

1. McCardle was the editor of the *Vicksburg Times*, and he was arrested by General Gillem "acting pursuant to the Military Reconstruction Act" and "was charged with disturbing the peace, inciting to insurrection and disorder, libel, and impeding reconstruction, solely on the basis of several vituperative, anti-reconstructionist editorials he had authored and published in the *Times*." Id. at 236. So McCardle was a civilian being prosecuted by the military for political speech published in a newspaper.

2. After the lower federal court denied McCardle's application for a writ of habeas corpus, he appealed to the Supreme Court pursuant to the Habeas Corpus Act of 1867. Id. at 237.

3. Congress then passed the Repealer Act to repeal that portion of the Habeas Corpus Act granting the Supreme Court appellate jurisdiction. "The Repealer Act was intended to prevent the Court from determining whether McCardle was being held in military custody in violation of the Bill of Rights and to preclude the possibility that the Military Reconstruction Act of March 2, 1867, imposing martial rule [in the Southern states] would be declared unconstitutional." Id. at 240-241.

4. "[W]hereas Marbury would be read to declare that 'while we are under a Constitution, the Constituion is what the judges say it is,' Ex Parte McCardle appeared to lay down a very sobering afterthought: Congress may prevent the Supreme Court from saying anything at all, at least where its appellate jurisdiction is concerned." Id. at 244.

5. "The power to make exceptions to Supreme Court appellate jurisdiction is a plenary power. It is given in express terms and without limitation, regardless of the more modest uses that might have been anticipated and, hopefully, generally to be respected by Congress as a matter of enlightened policy once the power was granted, as it was, to the fullest extent. In short, the clause is complete exactly as it stands: the appellate jurisdiction of the Supreme Court *is* subject to 'such Exceptions and under such Regulations as the Congress shall make." Id. at 26.

6. Prof. Gunther doesn't think this is a big deal. As he puts it, Article III "grants a very broad discretion to Congress in assigning federal question litigation to state or federal courts....In doing so, Congress merely relies on the state courts to enforce federal rights, part of their traditional, originally contemplated role and one that they often have handled with independence...."

7. Hmmm. Perhaps you could argue that the "exceptions" clause in Art. III, Sect. 2 means that Congress may make exceptions to the Supreme Court's appellate jurisdiction only by shifting the jurisdiction to the Supreme Court's original jurisdiction. In other words, the Supreme Court could still exercise jurisdiction over the excepted class of cases, but original jurisdiction rather than appellate jurisdiction. What do you think of this argument? Does it substitute one problem for another?

McCardle & Jurisdiction Stripping Legislation

Professors Choper et al note:

"*According to Charles L. Black, Jr.,...Congress' power to restrict federal court jurisdiction is 'the rock on which rests the legitimacy of the judicial work in a democracy.' Crudely summarized, his view is that the vast power exercised today by courts, and especially the Supreme Court, is legitimate only insofar as it rests on popular consent--and any claim that the people have consented would be empty unless it were recognized that the people, through their elected representatives, could limit the federal judiciary's exercise of judicial review. Black offers his argument as a friend, not a critic, of federal judicial review. Should other friends of judicial review be persuaded?*"

On the other hand, should critics of judicial activism concede that activism is legitimate so long as Congress has refrained from stripping jurisdiction from the Court? Assuming the Court has gone beyond its constitutional authority in some (or many) of its decisions, does the failure of Congress to chastise the Court somehow legitimize illegitimate and abusive assertions of power by the Court? Does Congress have power to waive the right of the People to insist that the Court not go beyond the limits of its legitimate constitutional authority?

Remember also that the Constitution was not ratified at the national democratic level, but rather it is *federally democratic*, ratified by three-fourths of the several, sovereign states with each state having one vote to ratify.

Art. III (Judicial Power) and Art. VI (Supremacy Clause)

Article III

Section 1.

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2.

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, **with such exceptions, and under such regulations as the Congress shall make.**

The trial of all crimes, except in cases of impeachment, shall be by jury; and such

trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Article VI

....
This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Posted by Prof. Rick Duncan at 12:52 PM

Article III's Constitutional Minimum for Standing

One commentator nicely summarizes the case or controversy requirement:

"In order to establish standing, a plaintiff must show three things:

* injury in fact
* causation; and,
* redressability.

With respect to each of these elements, the plaintiff bears the burden of pleading and proof. It is also important to note that **where a plaintiff"s complaint seeks several different forms of relief, plaintiff must separately establish standing as to each of these claims.** This may mean, for example, that while a plaintiff has suffered a sufficient past injury to give her standing on a claim for damages, any threatened future injury may be too speculative or remote to give plaintiff standing to seek prospective injunctive relief."

Does this shed some light on the *Lyons* case we will be discussing soon?

Why Justiciability?

The following post is based on Prof. Brilmayer's law review article on Justiciability (93 Harv. L.Rev. 297 (1979)):

The justiciability doctrine often seems difficult to understand. Why should judicial review be limited to actual cases or controversies? Why shouldn't the Court decide constitutional questions whenever they are asked to do so?

I think two principles can help us understand justiciability as a coherent constitutional doctrine.

First, judicial restraint in this area is based on the relationship among courts over time. Stare decisis insures that future courts will not be too quick to substitute their legal views and policy choices for those of present courts. Justiciability insures that present courts will not be too quick to reach and decide cases before their time. Stare decisis restrains future courts. Justiciability restrains present courts.

> *To allow a court to settle any matter it wished to address would give precedence to the preferences of earlier courts, who [through stare decisis] are able to tie the hands of subsequent ones. There is a clear need for some mechanism to allocate decisionmaking responsibility among successive courts, by specifying the point at which an issue may be addressed. (93 Harv. at 304.)*

How do you suppose a future court would view stare decisis if it believed that an earlier court had reached out to decide issues before they had become justiciable?

They might choose to ignore stare decisis and overrule many of the earlier cases. This harms the integrity of the Court and weakens the force of judicial decisions.

Think of justiciability and stare decisis as a covenant among past, present, and future courts – each court decides only the actual cases which arise during its time and respects the decisions of earlier courts. As the

Gallo Brothers like to say – "we will sell no wine before its time."

A second principle that explains the justiciability doctrine is what Prof. Brilmayer calls the “representation perspective.” That is, since constitutional decisions bind future generations, courts should only decide constitutional questions in the context of a real, concrete case brought by a real party with a real injury. We do not want the court to decide abstract principles of constitutional law which will establish a precedent and thereby affect the rights of persons who are harmed by the challenged governmental law or policy.

Suppose I challenge military regulations which keep women out of combat. I lose. Later a woman directly affected by the rules sues. The decision in my case is an adverse precedent against her, and she may believe that I was not the best party to litigate her interests.

Also, separation of powers issues are present. The judicial power exists only to decide real litigation between actual adverse parties, not to issue advisory opinions or to serve as a body of overseers of the actions of Congress or the states.

Adequate and Independent State Ground Doctrine--Takeaways

1. In the words of one commentator:

"A state court may rule that a state law is repugnant to the state constitution, and also find, as an independent, alternative holding, that the state law violates the U.S. Constitution. In this case, there is no federal question for the Supreme Court to review," because it must affirm the state court's judgment under the state constitution since *"the U.S. Supreme Court cannot reverse the state court on an interpretation of the state constitution."*

2*."If the state court holds the state law valid under both state and federal constitutional provisions, then the Supreme Court may review. In that case, if it disagreed with the state court's view of the federal constitution...the state decision would be reversed [under the Supremacy Clause] regardless of the [state court's] interpretation of the state law."*

3.Under *Michigan v. Long*, simply notice that in order for the adequate and independent state grounds doctrine to be triggered, the state court decision must indicate *"clearly and expressly that it is alternatively based on bona fide, adequate, and independent grounds."* If the state court opinion is

ambiguous about whether it is based on independent state grounds, federal courts will assume that the decision is based solely on federal grounds and the doctrine will not apply.

Power: Who Decides, Who Rules?

I know some of you are struggling with these early cases in Con Law.

They appear to be about nothing--*Marbury*'s dinky little appointment, an academic debate about originalism vs. the living constitution, the exceptions clause to the Supreme Court's appellate jurisdiction (yawn), who owns Blackacre (*Martin v. Hunter's Lessee*).

These early materials are all about power--who decides what our laws and fundamental rights should be: the federal courts, Congress, state legislatures and state courts, the People? Where does power lie and how is it checked lest it become absolute?

I really like a hockey metaphor when thinking about checks and balances.

Congress has the puck and is checked by the Court, the Court has the puck and is checked by Congress, the Feds have the puck and are checked by the states, the powers that be make a mess of things and the People call a Constitutional Convention to press the restart button on some issues and try things a different way.

These cases are hard to read and the facts of the cases are difficult to get excited about, but the issues are huge. Are we serfs? Or free men and women? Do we govern ourselves through the democratic process? Or are we governed by an unelected tribunal? Or maybe a little of each?

Who sez? Who decides?

Great stuff once you get into the battle!

Adequate and Independent State Ground Doctrine

Suppose our client is an Amish farmer who is charged with driving a slow moving vehicle without displaying a bright orange warning sign. Our client refuses to display the sign because his religion commands him to live a plain and humble life, and bright orange signs are designed to call attention to the driver and his vehicle by being loud and colorful.

The case goes through the state courts (say, in Minnesota) and the Minnesota Supreme Court reverses our client's conviction under the motor vehicle laws based upon two grounds:

1. The Free Exercise Clause of the U.S.Constitution protects our client from a law that substantially burdens his religiously-compelled conduct;and
2. The religious freedom clause of the Minnesota state constitution protects our client's right to conduct himself based upon his religious conscience.

Suppose the Minnesota Supreme Court misinterpreted the Free Exercise Clause and erroneously held that it protects our client's right to drive without the orange sign. Does the U.S. Supreme Court have appellate jurisdiction to review the Minnesota Supreme Court's erroneous holding on a matter of federal law?

Now suppose that the Minnesota Supreme went the other way and:
1. rejected our client's Free Exercise claim;and
2. rejected our client's claim under the state constitution.

Does the U.S. Supreme Court have appellate jurisdiction to review the Minnesota Supreme Court's decision denying our client's Free Exercise claim? Or is the state law holding an adequate and independent ground for the judgment in the case?

Hint--if the state court's interpretation of the Free Exercise Clause is incorrect, would state law be an adequate basis for the judgment denying our client relief?

Cases Or Controversies

> ***Article III***
> Section 2. The judicial power shall extend to all **cases**, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all **cases** affecting ambassadors, other public ministers and consuls;--to all **cases** of admiralty and maritime jurisdiction;--to **controversies** to which the United States shall be a party;--to **controversies** between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.
> In all **cases** affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other **cases** before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.
> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Justiciability

We are about to spend a few days exploring the concept of justiciability, i.e. a collection of doctrines that seek to determine the scope of the judicial power of the federal courts under the Constitution. *"Thus, no justiciable controversy is presented when the parties seek adjudication of only a* ***political question****, when the parties are asking for an* ***advisory opinion****, when the question sought to be adjudicated has been* ***mooted*** *by subsequent developments, and when there is no* ***standing*** *to maintain the action."* (Casebook p. 60-61).

We will be spending a lot of energy discussing various aspects of each of the boldfaced terms concerning justiciability.

Here is how Erwin Chemerinsky defines the concept of "justiciability:"

> Perhaps the most important limit on the federal judicial power is imposed by a series of principles termed "justiciability" doctrines. The justiciability doctrines determine which matters federal courts can hear and decide and which must be dismissed. Specifically, justiciability included the prohibition against advisory opinions, standing, ripeness, mootness, and the political question doctrine.

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Martin v. Hunter's Lessee

Thomas, Lord Fairfax

This case involves two chains of title; the Tory Chain and the Patriot Chain.

Tory Chain

Lord Fairfax----------Thomas Martin

Patriot Chain

State of Virginia (by confiscation)---Hunter----Hunter's Lessee

Who owns Blackacre under federal law (the Treaty of 1794--soldiers win wars, diplomats lose the peace)?

Who owns Blackacre under Virginia state law?

Which law governs? Who decides?

Key passage: *"The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power."*

Taxpayer Standing

Suppose Congress passes an omnibus education bill that includes, among many other provisions, the following two sections:

1. One provision in the law provides college scholarship funds for minority students defined on the basis of race and ethnicity.

2. A second provision provides for funding vouchers for parents who send their children to non-public K-12 schools (including private religious schools).

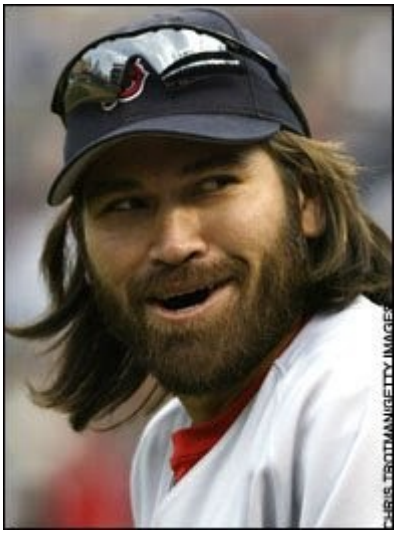
3. Yet another federal law provides funding for abortions under the Medicaid program.

Eugene Busybody, a federal taxpayer, files three lawsuits in federal court challenging the constitutionality of these programs. In lawsuit #1, he challenges the minority scholarship program as violating the Equal Protection Clause, in lawsuit #2 he challenges the voucher plan as violating the Establishment Clause (since religious schools will benefit), and in case # 3 he challenges the abortion funding provision under the Free Exercise Clause claiming that it violates his religious convictions to be forced to contribute to the funding of abortions, which his church teaches is a taking of an innocent human life.

Does he have standing as a taxpayer to bring these lawsuits?

See Carl H. Esbeck, *Taxpayer Standing from Flast to Hein*, (Mississippi Law Journal Online, Vol. 80, 2010).

Why Johnny Can't Fight



Here is a hypo that involves a young man who has applied to Nebraska Military College ("NMC"), a state college that specializes in military training and limits admission to males only.

Suppose John Damon, a young man who has a particular interest in the type of curriculum offered at NMC, applies to the school but is denied admission. He wishes to sue the school and its admissions policy in federal court. He would like to bring two constitutional claims against the school:

(1) a claim that the school's admissions policy violates the Due Process Clause of the 14th Amendment, because it's emphasis on personal recommendations from alumni of NMC renders the admissions policy arbitrary and capricious and thus violates due process; and

(2) a claim under the Equal Protection Clause of the 14th Amendment challenging the constitutionality of the policy because it's total exclusion of female applicants constitutes unlawful gender discrimination.

Assume that, on the merits, the first claim is weak and the second claim is strong. Does Johnny Damon have standing to assert these claims in federal court?

Craig v. Boren and Third Party Standing

Notice that Ms. Whitener, the saloon keeper, had a concrete injury in fact in her own right. She was governed by the drinking age law and suffered economic injuries as a result of having to turn away 18-20 year old male

drinkers.

Her problem is not the lack of an injury; her problem is that she does not have a strong constitutional claim in her own right (maybe a losing Takings claim, or a loser-of-a-claim asserting some kind of right to make a profit from her business).

The strong claim is the Equal Protection claim of young men who are discriminated against under this drinking age law. But Ms. Whitener is not a young man who is the victim of gender-based discrimination.

Thus, she runs head on into the Third Party Standing rule, a **prudential rule** that holds that A does not have standing to assert the claims of B (i.e., "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.")

Ms. Whitener may be a good representative of saloon keepers and their interests, but she is not a very good representative of young men who are denied equal access to a Bud Light!

Arizona Christian School Tuition Organization v. Winn

I. Arizona provides a dollar-for-dollar tax credit for contributions to school tuition organizations (STOs)

---tax credit of $500 per individual or $1000 per married couple
---these tax credits are very popular with an estimated total of $50 million per annum
---STOs are non-profits that use these contributions to fund scholarships for students attending private schools, many of which are religious
---Respondents sued as taxpayers who claim that the tax credit program violates the Establishment Clause

II. Taxpayer Standing: Do state taxpayers have Art. III standing to challenge a tax credit program such as Arizona's in federal courts?

A. General Rule--No taxpayers do not have standing to sue in federal court under Art. III's "case or controversy requirement" (*Frothingham* v. *Mellon*, 262 U.S. 447 (1923)

---no injury-in-fact: taxpayers economic injury was too "remote, fluctuating, and uncertain" to satisfy the case or controversy requirement

---moreover, taxpayers complaint is essentially nothing more than a generalized grievance, one "necessarily shared with millions of others"

---thus, held *Frothingham*, taxpayers did not present the Court with a "judicial controversy" but rather only a "matter of public ...concern" that should be pursued not through federal litigation but rather "through the political process."

Contrast:

A. Congress enacts a $200 million program providing diversity scholarships for minorities to attend college, Grumpy taxpayer (not a student excluded from the program, just a grumpy taxpayer) sues to enjoin the diversity scholarship program as a violation of the Equal Protection Clause. Result: No standing. Taxpayers do not suffer a concrete, redressable economic injury. Enjoining the program would not give Grumpy any benefit other than a generalized, ideological victory.

B. Congress enacts a $200 million program providing "theology scholarships" for full time clergymen to obtain advanced degrees in theology. Grumpy taxpayer sues to enjoin the program.

Should Example B be decided the same way as Example A (i.e., no taxpayer standing in either case, or taxpayer standing in both cases)?

III. Taxpayer Standing and the Establishment Clause

1. *Flast* v. *Cohen* provides a "narrow exception" to the general rule against taxpayer standing for federal taxpayers challenging a "congressional statute that allowed expenditures of federal funds from the General Treasury" to support religious schools. ("The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by *Congress of the taxing and spending power conferred by Art. I, s 8.*" Flast v. Cohen, 392 U.S. at 103-104.)

2. *Valley Forge Christian College* case refused to extend the *Flast* exception to federal taxpayers challenging the grant of federal land (not tax dollars, but surplus land owned by the federal government). The Court denied taxpayer standing and explained (454 U.S. at 479-480):

The plaintiffs in *Flast* satisfied this test because "[t]heir constitutional challenge [was] made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare," *id.*, at 103, 88 S.Ct., at 1954, and because the Establishment Clause, on which plaintiffs' complaint rested, "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8," *id.*, at 104, 88 S.Ct., at 1954. The Court distinguished *Frothingham v. Mellon, supra*, on the ground that Mrs. Frothingham had relied, not on a specific limitation on the power to tax and spend, but on a more general claim based on the Due Process Clause. 392 U.S., at 105, 88 S.Ct., at 1955. Thus, the Court reaffirmed that the "case or controversy" aspect of standing is unsatisfied "where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Id.*, at 106, 88 S.Ct., at 1956.

Unlike the plaintiffs in *Flast*, respondents fail the first prong of the test for taxpayer standing. Their claim is deficient in two respects. First, the source of their complaint is not a congressional action, but a decision by HEW to transfer a parcel of federal property.[FN15] *Flast* limited taxpayer standing to challenges directed "only [at] exercises of congressional power." *Id.*, at 102, 88 S.Ct., at 1954. See *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S., at 228, 94 S.Ct., at 2935 (denying standing because the taxpayer plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch").

Second, and perhaps redundantly, the property transfer about which respondents complain was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8. The authorizing legislation, the Federal Property and Administrative Services Act of 1949, was an evident exercise of Congress' power under the Property Clause, Art. IV, § 3, cl. 2. [FN16] **763 Respondents do not dispute this conclusion, see Brief for Respondents Americans United et al. 10, and it is decisive of any claim of taxpayer standing under the *Flast* precedent.

3. In the *Hein* case, the Court denied taxpayer standing to taxpayers who brought an EC challenge against funds expending by the President as a matter of Executive discretion under general appropriations. ("The link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here. Respondents do not challenge *any specific congressional action or appropriation*; nor do they ask the Court to invalidate any congressional enactment or legislatively created program as unconstitutional. That is because *the expenditures at issue here*

were not made pursuant to any Act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities.[FN4] These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain. Those expenditures resulted from executive discretion, not congressional action." 551 U.S. at 605).

IV. Taxpayer Challenges to State Expenditures

Does *Flast* even apply to taxpayer challenges brought against state tax expenditures appropriated by state legislatures? Even if the EC provides a specific structural limitation on the power of Congress to tax and spend under Art. I, section 8, how does that sturctural limitation of Congress get itself incorporated as an individual liberty interest under the doctrine of incorporation?

Standing In Newdow

In the recent Pledge of Allegiance case, Michael A. Newdow, "an atheist whose daughter" attends a school in which the Pledge is recited each day, filed a lawsuit in federal court arguing that "under God" in the Pledge made the daily exercise a religious endorsement in violation of the Establishment Clause of the First Amendment.

Although Newdow shared physical custody of his daughter with the child's mother, the mother, who does not object to the Pledge, was granted (by the family court order concerning custody matters) the right to "exercise legal control" over important decisions concerning the upbringing of the child.

Nevertheless, Mr. Newdow claimed that he was harmed by the Pledge in his

own right. Here is how he described his injury in his oral argument in the case (he is a lawyer who represented himself):

"I am an atheist. I don't believe in God. And every morning my child is asked to stand up, face that flag, put her hand over her heart, and say that her father is wrong."

What do you think? Has Mr. Newdow shown a sufficient concrete injury-in-fact to justify his standing to litigate this Establishment Clause case in federal court?

In *Newdow*, the Supreme Court distinguished between "Article III standing, which enforces the Constitution's case-or-controversy requirement...and prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" 542 U.S. at 11.

The Court seemed to accept that Mr. Newdow had alleged an actual, concret injury-in-fact, but nevertheless held that he lacked "prudential standing" because of the Court's reluctance "to intervene...[in] the realm of domestic relations."

Of course, the cases are legion in which the Supreme Court has chosen to intervene in the realm of domestic relations. Indeed, we will read many of these "domestic relations" cases later in the semester.

By the way, exactly what is "prudential standing?"

Prudential Standing

Here is an excerpt from a text by Profs. May & Ides:

"*While the case or controversy requirement establishes the constitutional minimum for the exercise of Article III authority, the mere satisfaction of that constitutional minimum is not always sufficient to establish justiciability. Prudential considerations*

sometimes operate to divest an otherwise constitutional case of its justiciable character. These prudential considerations are premised on a combination of concerns derived from principles of separation of powers, federalism, and sound judicial administration. At the heart of 'prudence,' is the Court's perception of the federal judiciary's proper function within the structure of government, and the Court's desire to avoid unnecessary clashes with other government institutions. These are essentially the same principles that inform the Court's interpretation of the case or controversy requirement. The prudential overlay, however, however, allows the Court to expand the application of those principles somewhat beyond the established minimum requirements of constitutional justiciability."

Think of prudential standing rules as rules that are derived from matters of constitutional policy, as opposed to strict constitutional limitations on judicial power.

Standing Hypo--Duncan vs Lincoln Police Department

Let's try to get a feel for standing.

Suppose I read in the newspaper that the Lincoln police department has an affirmative action plan which provides different passing scores on the sergeant's exam for whites, hispanics, and blacks. The passing score for whites is 70; for hispanics 68; and for blacks 65. The purpose of the plan is to promote people from under-represented groups. I sue the Lincoln police department claiming that this classification scheme violates the equal protection clause by discriminating on the basis of race. What result?

Why don't I have standing? Could I make any arguments that I should be allowed to litigate this case?

Raines v. Byrd

Art. I, sect. 7:

All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Powell v. McCormack & Nixon v. United States: Constitutional Provisions

Here are the relevant sections of Article I of the Constitution:

Re Powell:

--Section 2. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a Representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

--Section 5. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

Re Nixon:

--Section 2 The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

--Section 3 The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

Political Question Doctrine

Here are the factors from *Baker* v. *Carr,* which noted that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers" (Casebook p. 87). The factors are discussed on page 87 of the Casebook:

1. Is there "a textually demonstrable constitutional commitment of the issue" to one of the political branches of government?

2. Is there "a lack of judicially discoverable and manageable standards for resolving" the question?

3. Is it impossible to decide the question "without an initial policy determination of a kind clearly for nonjudicial discretion?"

4. Is there "an unusual need for unquestioning adherence to a political decision already made?"

5. Is there "the potentiality of embarrassment from multifarious pronouncements by various departments on one question?"

Which of these factors apply to the cases we are reading on this issue?

Practice Exam Exercise in Lieu of a Make-up Class

I am going to need to cancel 4 classes this semester due to my speaking schedule at other law schools.

Three of the classes are already made up (due to the extra 10 minutes we go each class). I would like you to spend an hour or so working through this problem (which was an exam question for this course a couple of years ago). We will then meet briefly (30 minutes or so) to discuss the problem. Here is

the relevant section of the Constitution that deals with the merits of the claim (assuming the issue is justiciable):

Art. II, section 2:

[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; **and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court,** and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law

I will schedule a time next week when we can go through this. Here is the exam question:

On February 13, 2016, Justice Scalia died. His death created a vacancy on the Supreme Court of the United States.

In March of 2016, President Barack Obama nominated Judge Merrick Garland, who currently serves as chief judge for the U.S. Court of Appeals for the District of Columbia Circuit. However, Senate Republicans – who comprise the majority and control the Judiciary Committee - have refused to hold a hearing or a vote on Garland's nomination, pledging instead to wait until after the 2016 election to consider a replacement for Scalia's seat.

Suppose, before the November election probably mooted his case, Judge Garland filed a lawsuit in federal court against Senate Majority leader Mitch McConnell seeking a writ of mandamus to require the Senate to hold hearings and a final vote on the Garland nomination.

Prior to the election of November 2016, was this case justiciable? Explain. Whether justiciable or not, explain the issues on the merits of Judge Garland's claim. Please limit your answers to approximately 750 words or less but be sure to explain your conclusions with supporting reasoning.

Garland Practice Exam Question: Model Student Answer

Below is an excellent (not perfect, but given that this was a closed-book exam, very good--not quite an A+ but basically an A) actual student answer to the past exam question about Judge Garland's nomination:

"***Article III of the Constitution provides that courts must hear cases or controversies. We don't want the Court issuing advisory opinions. They didn't do it for George Washington and they won't issue an opinion to anyone else who lacks a "case or controversy," Today, we consider this the doctrine of standing. In order for there to be a justiciable "case or controversy" within the confines of Art III, there must be an injury-in-fact, causation, and redressability by the courts. Here, it is clear that Judge Garland would satisfy the minimum constitutional requirements of a case or controversy. First, he has a clear injury-in-fact. His injury is concrete. The Senate's refusal to hold a hearing is potentially depriving him of a position on the nation's most powerful court. An interesting argument would be that the Senate's refusal to hold hearings is not an injury, because he doesn't know that if they will hold hearing, then he will be confirmed. However, I think the Court would find that Garland does have a concrete injury-in-fact when the Senate deprives him the opportunity of being confirmed to the nation's highest court. Second, there needs to causation. It is clear that the Senate is blocking Garland's confirmation, causing his injury. Third and finally, there needs to be redressability by the courts. Here, it would be easy in today's time of judicial supremacy for the Court to order the Senate to at least hold the hearings. Thus, this issue could be redressed by the courts. Garland meets all the requirements for constitutional standing under the "case or controversy" requirement of Art. III.***

While the Constitution sets out the absolute minimum requirement for what is justiciable (case or controversy), the Court can always impose greater requirements, such as third party standing or as will be discussed, the political question doctrine. These are prudential doctrines that the court does not have to observe, but can certainly choose to. The political question doctrine is the Court exercising judicial restraint, saying that certain matters are best left to the political branches (Congress and the executive) than the judiciary. Factors the court would look at come from Baker v. Carr. Primarily, the Court would examine whether there is a textual commitment to another branch. Here, there is no question but what the Constitution grants the Senate the power to give their "advise and consent" to presidential appointments. For a court to step into this territory, is to enter into the political arena that is more accountable to the people. Rather than for the court to decide, it should be left to the democratic process. If the American people are unhappy with how the Senate is doing their job as textually committed to them in the Constitution, they can vote them out.

Furthermore, a court would look to see if they would have to make a policy decision

before making a judicial decision. The Court's decision would be undoubtedly political. It

would revolve around how much they like Garland (and want to work with him). It opens

the door for huge biases. Finally, the court would look to the embarrassment factors and

if this would spark conflict between branches. Here, as I alluded to, the Court should be embarrassed if they take this decision out of the hands of the Senate. The Court is a body

of nine unelected lawyers that has very few checks on them. One of those few checks is

the power of appointment and confirmation by political branches (President and Senate).

If the Court were to intrude on the Senate's authority to give their advice and consent,

then the Court truly is the most powerful branch. This is just like the case regarding

Nixon (the judge) for his impeachment. This is the court interfering with a check on

themselves!!

I don't think the Court, activist as it is, would ever find that Garland's case is justiciable

because of the political question doctrine. However, if they do find standing and reach the

merits, Garland would still lose. The Constitution doesn't say anything about the Senate's duty to hold hearings. So, it's likely the court will say, like with the impeachment power, the Senate can do as it sees fit. Furthermore, even if the Court finds somewhere (maybe in the penumbras) that the Senate must hold hearings, the Senate would make "Garland" a verb. The Senate (whatever their ideological leaning) would never confirm Garland when they feel they were

railroaded into it by the Court. Especially when the vacant seat is Scalia's."

Originalism and Interpreting 18th Century Recipes

"Interpreting the Constitution is no more difficult, and no different in principle, than interpreting a late-eighteenth-century recipe for fried chicken." --Gary Lawson

But suppose you have an old recipe for, say, Great Grandma's egg nog, and it says something like this:

"Add nutmeg to taste."

Some would argue that such a "majestic generality" defies original meaning originalism and requires the modern reader to interpret the phrase as a living, evolving concept.

When someone asked me about this once, I replied as follows:

But nutmeg means nutmeg (as nutmeg was understood at the time the recipe was published). Maybe a little more for you, a little less for me. Maybe a pinch. Maybe two pinches. But certainly not a handful. But if you substitute cinnamon for nutmeg, you are amending the recipe, not following it. Okay so long as 3/4 of states ratify new recipe.

Suppose modern language no longer refers to "nutmeg" as nutmeg." Now nutmeg means "ground up dried fish guts" and the spice that used to be known as nutmeg is now called "ground Myristica."

If we are to be faithful to Great Grandma's recipe, what should we do about "add nutmeg to taste" when following her egg nog recipe today? Add ground fish guts? Or ground Myristica?

Art. V and the Amendment Process

Here is the text of Art. V, which makes it almost impossible for the Constitution to be amended by we the people:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

Here is my rough sketch of an amended Art. V, one designed to make it more difficult for the Court to amend the Constitution and easier for the people to do so:

1. The words and phrases of this Constitution shall be interpreted according to their ordinary meaning at the time of their enactment, which meaning shall remain the same until changed pursuant to Article V; nor shall such meaning be altered by reference to the law of nations or the laws of other nations.

[I borrowed most of this language from Randy Barnett’s proposed federalism amendment]

2. Whenever a majority of either House of Congress shall deem it necessary, such House shall propose Amendments to this Constitution, which shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States.

3. Whenever the Legislatures of any five of the several States shall deem it necessary, such Legislatures shall propose Amendments to this Constitution, which shall be valid to all Intents and Purposes, when ratified by the Legislatures of three-fourths of the several States.

4. Congress, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States.

5. Anything to the contrary herein notwithstanding, no state, without its consent, shall be deprived of its equal suffrage in the Senate.

Originalism vs. The Living Constitution: Questions for Discussion

1. What is original meaning originalism? What is The Living Constitution?

2. Justice Scalia says that originalism is the lesser of two evils, the librarian who speaks too softly rather than the librarian who speaks too loudly. He argues that the greatest defect of the Living Constitution—its total reliance on the subjective moral and philosophical preferences of the nine unelected lawyers who serve on the Supreme Court from time to time—is its incompatibility with the Rule of Law, “the very principle that legitimizes judicial review of constitutionality.”

What do you think he means by this? What is the Rule of Law and how does it differ from the Rule of Man?

3. Defenders of the Living Constitution sometimes try to argue that the Living Constitution is consistent with the Rule of Law because it has developed as a kind of common law system under which the "content" of constitutional law "is determined by the evolutionary process that produced it." It is evolution, not creation, and therefore the Supreme Court does not act as a Creator, or Ruler, but merely as a body of judges presiding over this "evolutionary process through the development of a body of precedents."

4. Proponents of the Living Constitution say that this approach is necessary because it is too difficult to amend the Constitution under Art. V, and thus common law evolution is necessary to provide the flexibility that is necessary in order for the law to keep up with the changing needs of contemporary society.

Which constitution is more flexible? The original Written Constitution? Or the living, evolving, common law constitution?

5. When the Court comes up with a novel new doctrine, ask yourself this question: Was there ever a time in American history when this new doctrine could possibly have been ratified by three-fourths of the states (38 states today)? In 1789? In 1868 when the 14th Amendment was ratified? In 2018? Ever? If your answer to this question is "no"--a doctrine like this could never have been ratified by we the people in the states (whose act of ratification is what gives legitimacy to the Constitution)--what does this tell you about the legitimacy of the Court's new doctrine?

Judge Bork on the Temptation of the Judiciary

Consider this gem from Judge Bork:

> In law, the moment of temptation is the moment of choice, when a judge realizes that in the case before him his strongly held views of justice, his political and moral imperative, is not embodied in a statute or in any provision of the Constitution. He must then choose between his version of justice and abiding by the American form of government. Yet the desire to do justice, whose nature seems to him obvious, is compelling, while the concept of constitutional process is abstract, rather arid, and the abstinence it counsels unsatisfying. To give in to temptation, this one time, solves an urgent human problem, and a faint crack appears in the American foundation. A judge has begun to rule where a legislator should.

Original Public Meaning Originalism vs. The "Common Law Living Constitution"

The “Great Debate” in constitutional law, one that has raged for over 200 years, is this: Should courts interpret the Constitution’s text as it would have been understood by ordinary citizens alive at the time the text was

ratified? Or should judges interpret the Constitution as a common law, “living” organism, one meant to evolve to suit the changing needs and values of contemporary American society?

Originalists believe that if the Constitution must evolve to keep pace with our constantly changing world, we should seek this change through the legitimate amendment process of Article V. Simply put: amendments should come from the people, not the Supreme Court.

However**,** proponents of a Living Constitution believe that the formal amendment process is too “cumbersome” to keep the Constitution current, and that necessity therefore requires the Supreme Court to preside over the "evolution" of the Constitution from the Bench. For example, if the written Commerce Clause does not give Congress sufficient power to deal with a global economy and contemporary problems such as the health care crisis, then it is the duty of the Court to recognize that the Constitution has evolved to meet our ever-changing political needs. After all, why should contemporary Americans be saddled with the views and philosophies of long-dead white males who had no understanding of the needs and values of America in 2018?

Here is what I would like you all to do for our class on Monday September 10.

Think about the readings and your personal understanding of what it means to have a written Constitution, a Constitution that is the supreme law of the land and invalidates all federal and state laws that are inconsistent with the Constitution, and compile several lists as follows:

1. a list of at least 3 reasons why you support an originalist interpretation of the Constitution
2. a list of at least 3 reasons why you support a common law "living" interpretation of the Constitution
3. a list of three arguments against originalism
4. a list of three arguments against common law constitutionalism

We will discuss your lists in class on Monday.

The Senate and the Seventeenth Amendment

Art. I, Section 3:

The Senate of the United States shall be composed of two Senators from each state, **chosen by the legislature thereof, for six years; and each Senator shall have one vote.**

Seventeenth Amendment:

The Senate of the United States shall be composed of two Senators from each state, **elected by the people thereof**, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures. When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.
This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Art. II, Section 2:

The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and **with the advice and consent of the Senate**, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and **by and with the advice and consent of the Senate,** shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen

during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Art. V

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that **no state, without its consent, shall be deprived of its equal suffrage in the Senate.**

Bye, Bye Miss American Pie

Just as the death in a plane crash, on February 3, 1959, of Buddy Holly,

Richie Valens, and the Big Bopper marked the "day the music died" for many rock and rollers of my generation, ratification of the Seventeenth Amendment is viewed by many supporters of "states rights" as the day that federalism died.

How so? Do you agree that the 17th Amendment killed federalism?

Post-Seventeenth Amendment Senate: Still a Force for Federalism

Is the Senate still a powerful force for federalism, for protecting the interests of the states and we the people who reside in the states?

How does the "equal representation" rule (each state gets two senators) rule fit in?

Prof. Sandy Levinson calls the Senate an “evil,” "egregious” and “undemocratic” institution, because it provides too much power to small states, particularly, as he puts it, “**small parochial rural states**,” such as Wyoming and our own beloved Nebraska.

In Levinson’s eyes, the chief evil of the Senate is precisely the quality that federalists view as its chief good—the fact that, says Levinson, “the Senate can exercise a veto power on majoritarian legislation passed by the House that is deemed too costly to the interests of the small states, which are overrepresented in the Senate..”

So Levinson calls the Senate undemocratic and evil because Wyoming has the same representation in the Senate as does California. The Wyoming voter has 70 times the voting power of the California voter, and this violates fundamental notions of political equality in Levinson’s view.

Do you agree with Levinson?

Now consider this response to Levinson.

As Martin Diamond explains, the Senate was designed to be “**federally democratic**” as opposed to “**nationally democratic**.” Elections for the Senate “are as freely and democratically contested as elections can be—**but in the states**. Victory always goes to the winner of the raw popular vote—

but in the states." Each voter in Wyoming and each voter in California has an equal vote in Senatorial elections—**but in his respective state**!

The Constitution creates the Senate to check national power and to advance federalism, by ensuring that each State in the Union has an equal voice in one branch of the National Government.

Indeed, a federally democratic Senate is more "democratic" than a nationally democratic Senate in at least one important respect—election of Senators at the state level ensures that each Senator is more likely to represent his statewide electorate than would be the case if we had a national election for the Senate. Each Senator elected to represent Wyoming in the Senate is a resident of Wyoming and was elected by the people of Wyoming. Thus, she is more likely to reflect the regional and cultural values of her electorate—the people of Wyoming-- than would be the case if Senators were elected by a national electorate. And the same is true for California, and Arizona and Hawaii and Alaska.

What do you think?

More on the Senate and Federalism--50 Shades of Federalism

Finally, let me briefly explain why I believe a veto power for the people in the States, as the Senate provides, even if it does not protect "states' rights" and the interests of state legislatures, nevertheless serves the best kind of federalism—federalism that protects liberty and provides what I call **sanctuary** for dissenters.

I think the key to understanding the good of the Senate, as well as of federalism and the Tenth Amendment more generally, is to recognize that these principles are designed, not to protect "states rights" in some abstract way, but rather to benefit "we the people" in the states. Federalism protects my liberty and your liberty by limiting the control of the Federal Government over our lives, our liberties, and our fortunes. If Obamacare had been stopped by a vote in the Senate, as it almost was when Sen. Scott Brown was elected in Massachusetts, we the governed would have been free of the taxes and regulations and burdens of this massive and intrusive federal program.

Proponents of robust federalism recognize that constitutional limits on the power of Congress, including in no small way the equal representation rule for the Senate, free citizens in the states from burdens imposed by a large and remote system of government. These limits on national power also recognize and respect the regional and cultural differences and

disagreements among us concerning the nature of the good life and what role government should play in helping us achieve the good life.

Federalism allows the states to serve as laboratories of social arrangements and values. But it also allows the states to serve as sanctuaries for those who prefer to live in a state with a different understanding of the good life.

This sanctuary function of federalism works particularly well in modern America, because our Nation is divided between Red States and Blue States (and Purple States in between) and we have very different notions of what constitutes the good life. Is the good life defined by high taxes and a culture of entitlement? Or by low taxes and a culture of individual responsibility? Is traditional marriage the foundation of the good life? Or is marriage equality for same-sex couples a necessary part of the good? Does the good life require strict separation between church and state? Or is religion a critically important part of our history and public culture?

Federalism in America, properly understood, limits the power of the National Government, as Madison put it so clearly in Federalist No. 45, to a "few and defined" areas "exercised principally on external objects, as war, peace, negotiation, and foreign commerce." Whereas, continues Madison, the "powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

What this means is that federalism recognizes that Americans do not all think alike, and thus each American is given the right to become a citizen of any one of the 50 states. We each get to choose among 50 different shopping carts filled with different governmental packages, different arrangements of taxes, regulations, benefits and liberties. Some may prefer California's shopping cart over Wyoming's. Some may prefer Wyoming's over California's. This is the beauty of "50 Shades of Federalism."

Election of the President

Art. II, section 1:

> The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

Amendment XII

The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;--The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--**the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.**

Here is an excerpt from my article:

The electoral system for selecting the President was the work of a "grand committee" of the convention, composed of one member from each state. Basically, as one scholar observes, the electoral system was the product of mutual give and take "that incorporated the principles of the 'Great Compromise' struck earlier in the Convention." As set forth in Article II of the Constitution, there is no national election for President. Instead, the President is selected by a system of electors appointed in each state "as the Legislature thereof may direct." The number of electors (*i.e.,* of electoral votes) in each state is "equal to the whole Number of Senators and Representatives

> to which the state may be entitled."To protect the federal character of the process from national influence, the Constitution further provides that "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." Once the electors are chosen, they cast their ballots and the person having the greatest number of electoral votes is elected President, so long as he receives a majority of all electoral votes. If no person receives a majority of electoral votes, the President will be elected by a majority vote in the House of Representatives with each state delegation in the House having one vote.

Interestingly, the delegates to the convention believed that it would be rare for the President to be chosen by electoral votes, because "nineteen times in twenty" no candidate would receive a majority of electoral votes. This, of course, would result in the President being chosen in the House of Representatives on the basis of state equality of suffrage. Thus, the vote of the electors would amount to a nominating process and the final selection of the President would be in the House "where the smaller states would have equality with the larger ones." Although the rise of the two-party system practically guarantees today an electoral vote majority for one of the two major party candidates, the Constitution was designed to go a long way toward equality for the lesser states in the selection of the President.

Structural Federalism in the Constitution

“So the point I make is that when all these factors are considered, it is not only the unit vote for the Presidency we are talking about, but a whole solar system of governmental power. If it is proposed to change the balance of power of one of the elements of the solar system, it is necessary to consider all the others.” -Senator John F. Kennedy

In 1956, Senator (later President) Kennedy explained how proposals designed to replace the electoral system with a national direct election of the President would strike a powerful blow against federalism: "I believe," said Kennedy, “it would break down the Federal system under which most States entered the Union, which provides a system of checks and balances to insure that no area or group shall obtain too much power." President Kennedy's powerful insight concerning the structural architecture of the Constitution's allocation of power was true in 1956 when he expressed it, it was true in 1787 when the Founder's created our constitutional solar system, and it is no less true today. I am convinced by the persuasiveness of Kennedy's argument in favor of the Constitution’s electoral vote system for election of the President.

Although some critics of the electoral system for selecting the President refer to its support of federalism as "meager," this fails to grasp the reality of Senator Kennedy's multi-planet vision of a constitutional "solar system" of federalism. Just as there are eight planets in the solar system we Earthlings physically inhabit, there are at least eight planets protecting federalism in our constitutional solar system:

1. Every election for national office is held in the states, in a federally-democratic election in which each voter in each state gets one, equally-weighted vote;

2. Although representation in the House of Representatives is allocated on the basis of population, each state is given an equality of suffrage in the Senate, and no State may be deprived of its equal representation in the Senate—not even by a constitutional amendment—without its consent;

3. The President is elected in 51 separate elections in the states (plus the District of Columbia) under a formula that gives smaller states somewhat more representation than larger states;

4. If no candidate for the Presidency receives a majority of electoral votes, the election is determined in the House of Representatives with each state delegation in the House having one vote;

5. Supreme Court Justices, other federal judges, and all other officers of the United States must be nominated by a President elected in the states under the electoral system and confirmed by the Senate in which each state has two senators elected in their respective states;

6. The President has the power to make Treaties so long as "two thirds of the Senators concur;"

7. Ordinary national laws require a majority vote in both the House and the Senate, and the President has the power to veto laws which may be overridden only by a two-thirds vote in both the House and the Senate; and

8. The Constitution may not be amended unless three-fourths of the states ratify a proposed amendment.

As President Kennedy understood, if you unravel one thread from the architecture of this carefully balanced constitutional solar system, you may create a disturbance in the force that might cause the entire structure to collapse.

Election Maps

Link

Con Con of 2018

Okay. I would like you all think about what you would do if you were a delegate from California or New York or Wyoming or South Dakota or Nebraska at the Constitutional Convention of 2018.

Our existing Constitution is about to expire and the 50 states will no longer be part of the Nation unless we can create a new Constitution that all states will be able to ratify.

What would you ask for and what would you be willing to accept in terms of the political structure of the New Constitution? House, Senate, President, Courts?

What do you want?

What would you be willing to accept to get a deal done? But remember, you have to take the deal back to your state for ratification. And all 50 states must ratify if we are to put the Nation back together.

My View of the Living Constitution

For me personally, the greatest defect of the Living Constitution (even a conservative living constitution striking down minimum wage laws, and other laws restricting freedom of contract and economic liberty) is this:

The Living Constitution is based upon the subjective moral and philosophical preferences of the nine unelected lawyers who serve on the Supreme Court from time to time. Thus, it is inconsistent with the Rule of Law, the very principle that legitimizes judicial review. As Judge Bork once said. "The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else." It is the Rule of Elite Men & Women, not the Rule of Law.

What is your strongest reason for supporting either Originalism or the common law Living Constitution?

Madison in Federalist 45

> *The powers delegated by the proposed Constitution to the federal government,* ***are few and defined.*** *Those which are to remain in the State governments are* ***numerous and indefinite****. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all* ***the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.***

Is this how things worked out? Is this why modern federalists are so upset with the size of the federal government and its power over the lives and fortunes of the people?

As we move into the next unit on "The Scope of National Power," keep Madison's views in mind and ask yourself whether the present federal government is the one defined and limited by the Constitution.

McCulloch v. Maryland: Federal Power vs. State Power

McCulloch makes clear a point we have already discussed a few times--the National Government was created as a government of enumerated powers--i.e.,"it can exercise only the powers granted to it" by the Constitution.

To make this even more clear, the Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

In the Federalist Papers No. 45, James Madison said this about delegated versus reserved powers:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce.... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

So if there are 100 units of governmental power and the Constitution delegates 10 units of power to the Federal Government, the states reserve the remaining 90 units of power.

But what happens if the Supreme Court consistently interprets the Constitution in ways which expand the powers of the Federal Government. Suppose that, as a result of these interpretations expanding national power, the Federal Government ends up with 99.5 units of power. How much power now is reserved to the states and the people under the Tenth Amendment?

Federalism is a zero-sum game in which every judicial win for the delegated power of the feds is a loss for the reserved powers of the states and the people.

As we discuss these cases broadly expanding federal power to regulate and to tax and spend, try to picture how this depletes the reserved powers of the

states and the people under the Tenth Amendment. And ask yourselves whether the current picture of respective governmental power resembles the one drawn by Madison in Federalist 45.

Tenth Amendment: Federalism as a Constitutional Command

I would like you to ponder the meaning and importance of the 10th Amendment for our class discussion. The 10th Amendment provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Is the 10th Amendment--one of the Bill of Rights after all--nothing more than a "truism" or "meaningless rhetoric" as some Justices have suggested from time to time? Or does it set forth an important principle, judicial enforcement of which is "essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution?"

Should the 10th Amendment be enforced by the Supreme Court under *Marbury* as part of the Supreme Law of the land? Or is it merely a precatory principle, a "pretty please" exhortation that is left for enforcement to the political process and the states' power to protect themselves from federal overreaching?

Notice there are two ways the 10th Amendment can become part of the constitutional equation in federalism litigation.

First, it can come in "as a rule of construction"--for example in Commerce Clause litigation--to suggest that there must be reasonable limits to

expansive interpretations of federal power if the states are to have **any** reserved powers. If the Commerce Clause permits Congress to regulate everything as affecting commerce, then the reserved powers of the states under the 10th Amendment will exist--if at all-- only at the pleasure of Congress. Thus, if the Commerce Clause and the 10th Amendment are read together, the reader might conclude that substantial limits to the commerce power are necessary to provide a reasonable scope to the reserved powers of the states under the 10th Amendment.

Second, as one commentator has put it: "[T]he principle of federalism may function as a [direct] check on the exercise of a granted power in much the same fashion as do [other] provisions of the Bill of Rights. In other words, just as Congress may not use its commerce powers to transgress the First Amendment, it may not use that power to violate the [Tenth Amendment and] the principle of federalism."

McCulloch v. Maryland: Notes and Questions

Note: For some background on *McCulloch*. read pages 122-128 of the Paulsen book (and think about our discussion of *Marbury* when you read the discussion, on pages 127-128, concerning President Jackson's veto of a bill to recharter the Bank).

--Congress charters the Bank of the United States (BOUS) in 1816
--The state of Maryland levied a tax on banks operating within the state without authority from the state
--BOUS did not pay the tax
--The state of Maryland sued McCulloch, the cashier of the Baltimore branch of BOUS, to collect the unpaid taxes

Two issues:

1. Does Congress have power to incorporate a bank?

2. Is Maryland's tax on BOUS unconstitutional?

I. Does the Constitution give Congress an explicit power (an enumerated power) to create a national bank?

Take a look at Art.I, sect. 8. Anything in there about the power to charter a

national bank?

No, but the Court says Congress does have power to "lay and collect taxes," to "borrow money," to "regulate commerce [with foreign nations, and among the several states, and with the Indian tribes]," and to "raise and support armies."

Okay, but not to incorporate a national bank, right?

Take a look at Art. I, sect. 8, cl. 18--the "necessary and proper clause"--Congress has an enumerated power: *"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."*

What does necessary and proper mean? Absolutely necessary? Reasonably convenient?

Holding (p. 114-115):

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all **means which are appropriate**, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional....

Necessary means "appropriate."

In *Comstock*, the Court made clear that the Necessary and Proper Clause is an almost unlimited expansion of the explicitly delegated powers. See p.118:

> [T]he Necessary and Proper Clause grants Congress **broad authority** to enact federal legislation.... Accordingly, the Necessary and Proper Clause makes clear [?] that the Constitution's grants of specific federal legislative authority are accompanied by **broad power** to enact laws that are "convenient", or "useful" or "conducive" to the authority's "beneficial exercise".... [W]e look to see whether the statute consitutes a means that is rationally related to the implementation of a constitutionally enumerated power....

Wow! And since this broad, almost unlimited, power is one of the delegated powers of Congress, then the Tenth Amendment does not reserve this power to the states and the people. If Congress has broad, practically unlimited power, than the states and the people have only whatever is left after Congress goes through the buffet line as often as it wishes! Congress gets the meat and potatoes and ice cream; and the states and the people get the lima beans and the orange-colored jello.

II. May the state of Maryland levy a tax on BOUS?

The Supremacy Clause Art. VI:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Page 115: "The power to tax involves the power to destroy." [I can't argue with that absolute truth]

No taxation without representation (p. 116:"[W]hen a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control.")

Holding p. 118: "We are unanimously of opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void."

As one commentator concludes:

> *Marshall's interpretation of the Necessary and Proper Clause remains the authoritative interpretation of that clause. As a consequence, Congress today is vested with broad discretion in choosing the means through which it will exercise its granted powers.*

But notice that Madison argued that:

> *Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress…The essential characteristic of the Government, as composed of limited and enumerated powers, would be destroyed, if instead of direct and incidental means, any means could be used….*

Necessary and Proper Clause

Article I, section 8 provides:

> Section 8. **The Congress shall have power** to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;
> To borrow money on the credit of the United States;
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
> To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;
> To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;
> To provide for the punishment of counterfeiting the securities and current coin of the United States;
> To establish post offices and post roads;
> To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;
> To constitute tribunals inferior to the Supreme Court;
> To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;
> To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
> To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
> To provide and maintain a navy;
> To make rules for the government and regulation of the land and naval forces;
> To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

> To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;
> To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;--And
> **To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.**

Notice that this clause requires not only that a law be "necessary" but also "proper." Keep this in mind as we work our way through the Commerce Clause caselaw.

Dormant Commerce Clause

The Court has construed the Commerce Clause not only as a grant of power to Congress, but also as a limitation on the power of the states.

First, when Congress has exercised its power under the Commerce Clause by enacting federal legislation, any conflicting state laws will be invalid under the Supremacy Clause.

But suppose Congress has not passed any law regulating some practice, but a state has enacted a law that restricts commerce in this area that Congress has left alone.

We don't have time to cover this extensively in the readings or in class, so let me just tell you that the Court has held that state laws that excessively burden interstate commerce violate the dormant (or negative) Commerce Clause. The Court applies a balancing test here that seeks to determine whether the state law imposes an excessive or unreasonable burden on interstate commerce.

This is particularly true when a state economic regulation affords local business or consumers an economic advantage at the expense of a free-

flowing national market.

Just be aware of this issue, which is explored in other courses in the curriculum.

Recent Poll on Support For Wickard

A recent Rasmussen poll found that only 7% of the public supports the reasoning of Wickard. (link)

Although the poll itself is only available to subcribers, Rasmussen did post the following explanation:

> Tuesday, July 10, 2012
>
> In 1942, the U.S. Supreme Court ruled that the federal government could regulate how much wheat a farmer could grow on his own property for his own use. That ruling dramatically enhanced the power of the federal government by making almost all economic activity subject to federal regulation as “interstate commerce." However, voters today overwhelmingly reject that underlying argument.

Our law library was able to get a little more clarification from the pollster:

> Only 7% Support Legal Reasoning That Led to Greater Government Regulation
>
> Tuesday, July 10, 2012
>
> In 1942, the U.S. Supreme Court ruled that the federal government could regulate how much wheat a farmer could grow on his own property for his own use. That ruling dramatically enhanced the power of the federal government by making almost all economic activity subject to federal regulation as "interstate commerce." However, voters today overwhelmingly reject that underlying argument.
>
> If a farmer grows wheat on his own land for his own use, just seven percent (7%) of Likely U.S. Voters believe the federal government should be able to limit and regulate how much he can grow. A new Rasmussen Reports national telephone survey finds that 86% disagree and reject this federal regulatory authority....

> In 1938, Congress passed a law limiting how much area farmers could devote to wheat production. The purpose of the law was to keep wheat prices higher for farmers, but its constitutionality was challenged by a farmer named Roscoe Filburn. A District Court upheld Filburn's challenge, but the Supreme Court's 1942 decision overruled it in a case known as Wickard v. Filburn . Filburn was ordered to destroy his crops and pay a fine.
>
> Today, only five percent (5%) believe the federal government should be able to keep prices high by preventing others from growing farm products on their own land. Eighty-eight percent (88%) disagree.
>
> This national survey of 1,000 U.S. Likely Voters was conducted on July 7-8, 2012 by Rasmussen Reports. The margin of sampling error is +/- 3 percentage points with a 95% level of confidence....
> Rasmussen Reports

Gibbons v. Ogden: Broad or Narrow?

Although this decision is often cited as an early one recognizing great power in Congress, notice on p.128 what the Court says the Commerce power does not include: "Inspection laws, quarantine laws, *health laws of every description*, as well as laws for regulating the internal commerce of a State..." These are not within Congress's power because "they act upon the subject *before it becomes an article of ...commerce among the States*." Id.

Commerce Clause: The Rules

From *Morrison*:

> As we observed in *Lopez*, modern Commerce Clause jurisprudence has "identified three broad categories of activity that Congress may regulate under its commerce power."
>
> "First, Congress may regulate the use of the channels of interstate commerce."
>
> [Note from RFD: This includes laws regulating "the terms and

conditions on which goods or services are sold interstate" and may even include laws restricting "the types of goods" that may be sold in interstate commerce]

"Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."

[Note from RFD: The instrumentalities of interstate commerce include interstate shippers such as railroads, airlines, trucking, etc. Thus, as May & Ides put it: "Congress may impose safety standards on local or intrastate carriers that use the same railway tracks, airspace, or highways as interstate carriers, in order to prevent these local carriers from endangering interstate carriers that operate on the same routes."]

"Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, ... *i.e.*, those activities that substantially affect interstate commerce."

Notice also that, under the Necessary and Proper Clause, Congress has the power to "make all Laws which shall be necessary and proper" to "regulate Commerce among the several States."

And as Justice Scalia notes in Raich (p. 167):

> The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself "substantially affect" interstate commerce. Moreover, as the passage from Lopez ...suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.

Query: Suppose Congress decides that obesity and its costs affect interstate commerce. Does Congress have the power to require obese people to sign up for Weight Watchers? Why or why not?

Commerce Clause and the 10th Amendment

Art.I, section 8:

The Congress shall have power....To regulate commerce with foreign nations, and among the several states, and with the Indian tribes

10th Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

The relationship between the Commerce Clause and the Tenth Amendment is like a Grantor of real property who conveys away a present estate and retains some kind of reversionary interest. What the Grantor does not convey away he retains.

Notice there is a huge difference between national power to "regulate commerce among the several states" and to "regulate anything that substantially affects interstate commerce."

The former is a 10-year lease that leaves the Grantor with a very substantial reversionary interest. The latter is a Fee Simple Absolute that leaves the Grantor with nothing or next-to-nothing.

Do you see this? This is where the rubber meets the road in terms of delegated national power and reserved powers of the states and the People.

Notice also that when the Court is deferential toward the Commerce power of Congress, it is necessarily non-deferential toward the reserved powers of we the people in the several states under the Tenth Amendment. To give to Congress is to take from the Tenth Amendment.

Lopez, Morrison & Raich

I think the distinction the Court makes between *Lopez* & *Morrison* on the one hand, and *Raich* (and *Wickard*) on the other is that the latter cases involved regulation of "quintessentially economic" activities that substantially effect interstate markets. The Court defined economic activity as "the production, distribution, and consumption of commodities for which there is an established, and lucrative interstate market."

Do you agree with this distinction?

What do you think of Justice O'Connor's dissenting argument in which she says the Ct's definition of economic activity is so broad that it "threatens to sweep all of productive human activity into federal regulatory reach." Is day care at home by parents an economic activity similar to commercial day care? Is playing charades or other games at home an economic substitute for going to the movies? Can Congress legislate under the Commerce power to limit our charades games at home to one per week to try to encourage more of us to buy a ticket to the movies? Can Congress regulate home care of children by forbidding home care during normal business hours (to protect the day care industry from unfair competition by parents) or by requiring "caregivers" (parents) to read at least 2 "multicultural books" per week during the day care hours to the "care recipients" (their own children)?

If you disagree with *Raich*, must you vote to overrule *Wickard* as well? I think you do, but I could be wrong about this.

Justice O'Connor, noting that the California Compassionate Use Act "exemplifies the role of States as laboratories," invokes the 10th Amendment and observes that California "has drawn on its reserved powers to distinguish the regulation of medical marijuana."

How should the 10th Amendment affect Commerce Clause analysis? Should the Court always remember that when it interprets the Commerce Clause broadly to advance Congressional power it necessarily causes the 10th Amendment to retreat in its protection of the reserved powers of the states? If Congress has virtually unlimited power under the Commerce Clause, what power is left for states to exercise under the 10th Amendment?

Suppose California decides to legalize recreational use of marijuana in the home by treating it the same way it treats alcoholic beverages. Should this "experiment" by California trump federal drug laws criminalizing the possession or use of marijuana? How is this different from "medical" use of marijuana? Is the difference that only more affluent Californians can afford to shop for a "weed doc" to write them a scrip for "medical" marijuana?

Kavanaugh and 17th Amendment

I wonder if a Senate selected by state legislators instead of by direct election would be as likely to politicize SCOTUS nominations? Playing to your political base in divisive times might lead to vicious battles over SCOTUS seats. Just a thought.

Individual Mandate Decision

What are your thoughts on the "activity" vs. "non-activity" issue?

Chief Justice Roberts (plus the Scalia four) believe that the power to regulate Commerce does not include the power "to force individuals into commerce.," or as Scalia puts it, "to make mere breathing in and out the basis for federal prescription and to extend federal; power to virtually all human activity."

The Court says requiring individuals to purchase a product is unprecedented. Is it?

What about mandatory automobile insurance laws? Do these laws come from Congress or the states? Do they regulate inactivity? Or do they apply only to people who own and drive automobiles on public streets?

Is the decision to choose self-insurance instead of third-party health insurance an economic activity that substantially affects interstate commerce?

Are all 300 million Americans already active in heath care and financing health care?

Tax Power, Commerce Clause and N & P Clause

Tax and Spend Clause (Art. I, sect. 8, cl 1)

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States

Commerce Clause (Art. I, sect. 8, cl. 3)

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

N& P Clause (Art. I, sect 8, cl. 18)

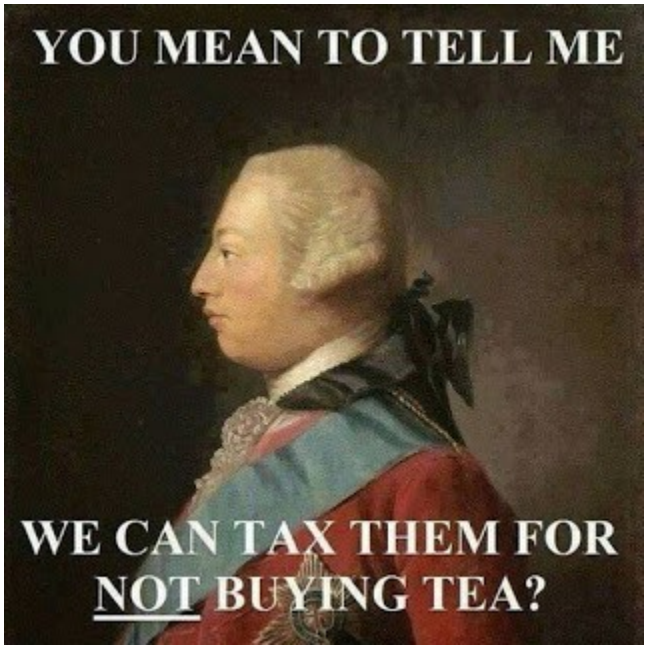
To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Broccoli tax

Could Congress pass a tax on the failure to purchase at least 2 pounds of broccoli per week? Suppose your income tax liability will be increased by $2000 unless you can produce receipts showing the purchase of at least 100 pounds of broccoli during the relevant tax year. Constitutional?

Notice that "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide *for the common defense and general welfare* of the United States."

Obamatax



Remember, everything goes back to *Marbury* v. *Madison*.

Remember I criticized Chief Justice Marshall for refusing to interpret the Judiciary Act in a way which avoided the constitutional issue. What is that principle?

See casebook at p. 189:

> The text of a statute can sometimes have more than one possible meaning. To take a familiar example, a law that reads 'no vehicles in the park'
> might, or might not, ban bicycles in the park. And it is well established that if a
> statute has two possible meanings, one of which violates the Constitution,
> courts should adopt the meaning that does not do so. Justice Story said that
> 180 years ago: 'No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation,
> however unintentional, of the constitution.' Parsons v. Bedford, 3 Pet. 433,
> 448–449 (1830). Justice Holmes made the same point a century later: '[T]he
> rule is settled that as between two possible interpretations of a statute, by one
> of which it would be unconstitutional and by the other valid, our plain

> duty is
> to adopt that which will save the Act.' Blodgett v. Holden, 275 U.S. 142, 148
> (1927) (concurring opinion)....

Although conservatives attacked Chief Justice Roberts for saving Obamacare by resorting to this principle, I have to admit that, as much as I would like Obamacare and all of its burdens and requirements to disappear forever, Chief Justice Roberts probably did the right thing in interpreting the mandate as a tax rather than a penalty. Even though Congress called it a penalty, it could reasonably be construed as a tax that was called a "penalty" only because calling it a tax would have been politically harmful to President Obama who had promised not to raise taxes on those making less than $200,000.

Health Care Decision--Conditional Spending Issue

Issue--see p. 199:

Seven members of the Court voted to strike down portions of the Patient Protection and Affordable Care Act of 2010 that required States to accept significant expansion of the Medicaid program to previously uncovered persons, or else lose all federal funding for Medicaid, even funding that was available to cover persons who were eligible for Medicaid before the 2010 Act's expansion.

First, does this condition satisfy the 4-part *Dole* test? Is there a reasonable relationship between the condition and the federal interest in insuring the uninsured? Or does this condition amount to an unreasonable form of coercion on the states to comply with the federal program?

See p.201:

> In South Dakota v. Dole, we considered a challenge to a federal law that
> threatened to withhold five percent of a State's federal highway funds if the
> State did not raise its drinking age to 21. The Court found that the condition
> was 'directly related to one of the main purposes for which highway

funds are
expended—safe interstate travel.’... At the same time, the condition was not a
restriction on how the highway funds—set aside for specific highway improvement
and maintenance efforts—were to be used.

We accordingly asked whether ‘the financial inducement offered by Congress’
was ‘so coercive as to pass the point at which ‘‘pressure turns into compulsion.’’ ’ ... By ‘financial inducement’ the Court meant the threat of
losing five percent of highway funds; no new money was offered to the States to
raise their drinking ages. We found that the inducement was not impermissibly
coercive, because Congress was offering only ‘relatively mild encouragement to
the States.’ ... We observed that ‘all South Dakota would lose if she adheres to
her chosen course as to a suitable minimum drinking age is 5%’ of her highway
funds...In fact, the federal funds at stake constituted less than half of one
percent of South Dakota’s budget at the time.... In consequence, ‘we conclude[
d] that [the] encouragement to state action [was] a valid use of the spending power.’ ... Whether to accept the drinking age change ‘remain[ed]
the prerogative of the States not merely in theory but in fact.’ ...‘‘In this case, the financial ‘inducement’ Congress has chosen is much more
than ‘relatively mild encouragement’—it is a gun to the head. Section 1396c of
the Medicaid Act provides that if a State’s Medicaid plan does not comply with
the Act’s requirements, the Secretary of Health and Human Services may
declare that ‘further payments will not be made to the State.’ 42 U. S. C.
§ 1396c. A State that opts out of the Affordable Care Act’s expansion in health
care coverage thus stands to lose not merely ‘a relatively small percentage’ of
its existing Medicaid funding, but all of it.... Medicaid spending accounts for

> over 20 percent of the average State’s total budget, with federal funds covering
> 50 to 83 percent of those costs....

This is a significant holding. As Justice Ginsburg observes in her dissent, "the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.’’

Why does the amount of coercion matter? As Justice Roberts put it in fn 12 of his opinion: " *More importantly, the size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden. “Your money or your life” is a coercive proposition, whether you have a single dollar in your pocket or $500."* This is a buried bone that may be dug up later to overrule *South Dakota v. Dole.*

Many states may choose to opt out of the Heath Care Act's expansion of medicaid, thus limiting the law's reach. Moreover, as one commentator complains:

> The federal government has lost considerable leverage over what type of program Medicaid will be, giving states unprecedented leeway to do less for their low-income uninsured. The upshot is that this 47-year partnership between state capitols and Washington may now be obsolete....Medicaid may have to become a national program, financed and operated by the federal government, just like Medicare is.

Another commentator also complains:

> The main trouble with Robert's decision is ambiguity. While saying that Congress could constitutionally impose a smaller penalty on a state, Roberts doesn't specify at what level a penalty becomes coercive...The result is likely not only to be a flood of litigation but also uncertainty in Congress about the conditions it can attach to the funds going to a wide range of federally supported programs in the states.

Is this a good thing or a bad thing for federalism?

Does it depend upon what kind of federalism we are concerned about: co-operative federalism or competitive federalism?

Should the states be junior partners in national programs?

Or competitive sovereigns making their own public policy choices without coercion or encouragement from the federal spending power?

If ambiguity is the problem, how about a bright line against all conditions attached to spending programs. If coercion of states by Congress is bad, isn't it also bad for Congress to bribe states? Shouldn't state laws reflect the will of the people who reside in the states, rather than the will of Congress, whether accomplished by coercion or bribery?

Why should the amount of the coercion matter? Whether a state forfeits $1 million dollars or $1 Billion dollars, isn't Congress ordering the State to regulate as Congress wishes, rather than as the state legislature wishes?

As Justice Roberts himself put it in a footnote to his opinion, "'Your money or your life' is a coercive proposition, whether you have a single dollar in your pocket or $500."

Is this a phrase he put in the opinion to use in some future case, perhaps one seeking to overrule *Dole*?

Here is a bit more for you. A bit redundant, but a little more detail.

I want to focus on the Necessary & Proper Clause and its application to the Individual Mandate decision. Chief Justice Roberts made clear that it is not enough that some action on the part of Congress is "necessary" to its Commerce Power, it must also be "proper." Consider this passage from his opinion:

> As our jurisprudence under the Necessary and Proper Clause has developed, we *2592 have been very deferential to Congress's determination that a regulation is "necessary." We have thus upheld laws that are " 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.' " *Comstock*, 560 U.S., at ––––, 130 S.Ct., at 1965 (quoting *McCulloch, supra*, at 413, 418). But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not "consist[ent] with the letter and spirit of the constitution," *McCulloch, supra*, at 421, are not " *proper* [means] for carrying into Execution" Congress's enumerated powers. Rather, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.' " *Printz v. United States*, 521 U.S. 898, 924, 117 S.Ct.

2365, 138 L.Ed.2d 914 (1997) (alterations omitted) (quoting The Federalist No. 33, at 204 (A. Hamilton)); see also *New York*, 505 U.S., at 177, 112 S.Ct. 2408; *Comstock, supra*, at ––––, 130 S.Ct., at 1967–1968 (KENNEDY, J., concurring in judgment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause ...").

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. For example, we have upheld provisions permitting continued confinement of those *already in federal custody* when they could not be safely released, *Comstock, supra*, at ––––, 130 S.Ct., at 1954–1955; criminalizing bribes involving organizations *receiving federal funds*, *Sabri v. United States*, 541 U.S. 600, 602, 605, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004); and tolling state statutes of limitations while cases are *pending in federal court*, *Jinks v. Richland County*, 538 U.S. 456, 459, 462, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003). The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.

This is in no way an authority that is "narrow in scope," *Comstock, supra*, at ––––, 130 S.Ct., at 1964, or "incidental" to the exercise of the commerce power, *McCulloch, supra*, at 418. Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. **Even if the individual mandate is "necessary" to the Act's insurance reforms, such an expansion of federal power is not a "proper" means for making those reforms effective.**

Spending Power and Conditional Grants

The Gotham Times recently published a piece that directly relates to what we are reading this week. Here is a brief excerpt:

> Crisscrossing the country, hundreds of thousands of long-haul truckers use computers in their cabs to get directions and stay in close contact with dispatchers, saving precious minutes that might otherwise be spent at the side of the road.

> The trucking industry says these devices can be used safely, posing less of a distraction than BlackBerrys, iPhones and similar gadgets, and therefore should be exempted from legislation that would ban texting while driving.
>
> “We think that’s overkill,” Clayton Boyce, spokesman for the American Trucking Associations, said of a **federal bill that would force states to ban texting while driving if they want to keep receiving federal highway money.**
>
> The legislation will be discussed at a conference on distracted driving in Washington, starting Wednesday, organized by the Transportation Department.
> The issues raised by truckers show the challenges facing advocates for tougher distracted-driving laws, given that so many Americans have grown accustomed to talking and texting behind the wheel.

Here is the link: NYT

Taxing and Spending Power

> Ronald Reagan on Federal Taxation: "Government's view of the economy could be summed up in a few short phrases: If it moves, tax it. If it keeps moving, regulate it. And if it stops moving, subsidize it."

Art. I, section 8, clause 1 provides:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States.

The Rotunda article assigned by link is a very good summary of the power of Congress to tax and spend. May and Ides also have a good summary:

> Most important, in *United States* v. *Butler*...the Court held that the power to tax and spend is a distinct constitutional power, fully effective without reference to other granted powers....There is no

> need, therefore, to demonstrate that a taxing or spending measure is directed toward interstate commerce, naturalization, the establishment of post offices, or any other granted power. Thus although Congress may not be able to regulate a local activity that does not substantially affect interstate commerce, Congress may nonetheless tax that activity, or spend money to encourage it, as long as in doing so Congress is promoting the general welfare. In short, the power to tax and spend stands on its own and may be exercised whenever doing so comes within the terms of the grant and does not exceed applicable limitations.
>
> ....
>
> Like all constitutional powers, the power to tax and spend is subject to the Bill of Rights as well as to other generally applicable constitutional limitations.

This extreme deference by the Court to Congress is what allows the national government to tax hard-working Americans to bail out Wall Street and the auto industry, and to fund health care, education, housing, social security, and practically everything else from the cradle to the grave. Hamilton's national Leviathan prevailed over Madison's vision of a much smaller and more restrained federal government.

The only tax and spend issue we will discuss in class is *South Dakota* v. *Dole* and so-called "conditional spending measures." Here is the issue. Assume a matter of regulation--for example, marriage and divorce law or regulation of alcoholic beverages and the legal age to drink--is one reserved to the states and thus outside the regulatory power of Congress. May Congress regulate these matters indirectly by attaching some kind of condition to a spending bill appropriating, for example, federal highway funds to the states? This, of course, is exactly what Congress did in *Dole*, (see casebook p. 198-199), when it ordered "the Secretary of Transportation to withhold a percentage of federal highway funds to which a state would otherwise be entitled" unless the state's drinking age law set the minimum age to drink at 21.

Should the Court strike down all attempts by Congress to invade the 10th Amendment reserved powers of the states by attaching conditions to spending bills? Is this an abuse of Congressional power? Or a positive means of encouraging co-operation between Congress and the States?

One of my favorite federal statutes (perhaps my only favorite federal law) is the Religious Land Use and Institutionalized Persons Act, one part of which provides for religious liberty in prisons. Here is the relevant provision:

SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.
(a) GENERAL RULE- No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.
(b) SCOPE OF APPLICATION- This section applies in any case in which--
(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

Is the conditional spending provision appropriate under *Dole*? In other words, by conditioning federal funding of state prisons on state compliance with RLUIPA, has Congress acted within its powers under the *Dole* test for conditional funding? Is this consistent with the idea of federalism?

Finally, consider how the Court dealt with the conditional spending issue in the Health Care Decision. Some analysts think this is the most far-reaching part of the HCD. Do you agree?

11th Amendment and Federal Judicial Power

When the Supreme Court decided *Chisholm* v. *Georgia* in 1793 (see casebook p. 245), which permitted a citizen of South Carolina to sue the State of Georgia in federal court, the decision was shocking and surprising. This "reaction stemmed in large part from the fact that the Constitution's supporters had given express assurance" that the Constitution did not deprive a state of its sovereign right "not to be amenable to the suit of an individual without its consent." (commentator quoting Hamilton in The Federalist No. 81).

Here is the relevant passage of The Federalist No. 81 (Alexander Hamilton) in greater detail:

> Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.
>
> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

The 11th Amendment was ratified to overrule *Chisholm*:

> Amendment XI
>
> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Does the 11th codify the right of a sovereign state "not to be amenable to the suit of an individual *without its consent.*" Or does the express language of the 11th Amendment fall short of expressing that doctrine in its entirety?

Garcia--edited passages

Here are some passages from the dissents edited from your casebook:

1. Justice Powell*: "judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers...."*

2. Justice O'Connor: The principle of federalism and state-*autonomy "requires the Court to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power."*

What are your thoughts? Does Justice O'Connor have a really good point? Where's Waldo?

Herein of Garcia, New York v. United States and Printz, etc

> Here is a nice summary from the May & Ides book:
>
> "*New York* v. *United States* did not overrule Garcia, for the cases dealt with completely different types of federal action. It is therefore important to understand what Congress can do under *Garcia* and what it cannot do under *New York* v. *United States*. Consistent with *Garcia*, Congress can, for example, directly regulate the states; as in *Garcia*, Congress can mandate the wages and hours of state employees. Under *New York* v. *United States*, however, Congress cannot use the states as an administrative arm for implementing federal regulatory policy. Thus while the states may be required by Congress to pay their own employees a certain minimum wage under FLSA, the states may not be ordered to have their employees perform certain federally mandated functions such as monitoring private employers' compliance with FLSA. Congress may seek to entice states voluntarily to join a federal regulatory program; they simply cannot be forced to do so. The critical distinction is thus between enticement and direct coercion."

Do you see now why, in *Printz,* Congress' attempt to commandeer local police departments to perform background checks on purchasers of handguns "does precisely what the Court in *New York* v. *United States* says Congress cannot do?" The Brady Act "commandeers states into enforcing a federal regulatory scheme by making local law enforcement officers the administrative agents of the federal government."

If Congress wishes to require background checks on handgun purchasers it must bear the economic and political costs of the program itself, rather than impose them on state officials. When I am upset with **federal agents** poking their noses into my life and charging excessive fees for the privilege of purchasing a gun, I will know that my beef is with the Federal Government--not state government--and perhaps I will vote accordingly.

Now think about how President Trump would like to crack down on "sanctuary cities." What are the typical proposals? Are they consistent with federalism?

Tenth Amendment--One of the Bill of Rights

> ### Amendment X
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Chase vs. Iredell

Make sure you pay attention to the little debate in *dicta* between Justice Chase and Justice Iredell on page 407-408.

Who do you think won the debate? Why?

What are the most and least persuasive points of each side?

Privileges and/or Immunities

1. **Art. 4, section 2**: "The citizens of each state shall be entitled to all privileges **and** immunities of citizens in the several states."

2. **14th Amendment**:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges **or** immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Dred Scott and Substantive Due Process

The Court in *Dred Scott* believed it was taking the issue of slavery out of politics by "constitutionalizing" it. Should the Court use SDP to create new unenumerated liberties in order to remove politically controversial issues from the political process?

Did it work out well in 1857?

If you believe *Dred Scott* was a wrong decision, what do you think is wrong about it? Is it the Court substituting its political judgment for the political judgment of Congress? Or is it okay for the Court to impose its will so long as its will is based upon good moral principles? Who should decide which code of morality and justice is the correct one?

Was Justice Taney's use of SDP in *Dred Scott* an example of judicial activism? Why or why not?

Barron v. Mayor of Baltimore (p. 411)

Here is how one scholar, Prof. Eugene W. Hickok, describes *Barron* as a great landmark of the principle of federalism:

> Perhaps the most forceful articulation of the importance of the Bill of Rights to the principle of federalism was uttered…by none other than

> Chief Justice John Marshall. Writing for the Court in Barron v. Baltimore (1833), Marshall dismissed a plaintiff's case which argued that the Fifth Amendment provision prohibiting the taking of private property for public use without just compensation also restrains state action.....With Barron, the Court unequivocally supports the Bill of Rights as a protection of state action every bit as much as a prohibition against national action. It is a view very much at odds with the contemporary understanding of the Bill of Rights. But Marshall's view of the applicability of the guarantees in the Bill of Rights held sway for several generations....

What does Prof. Hickok mean by this? How does the Bill of Rights, as a restraint only against the National Government, protect the principle of federalism? Where do we the people, who live in one of the several states, look for the protection of our liberties against our state government?

When we took our first step out of serfdom, and stopped bowing and scrapping to our lords and masters, how did we accomplish this? Is the right of democratic self government, the right to govern ourselves by voting for the state representatives who make our state's laws, an important liberty of a free people? When federal courts strike down state laws as violating, say, the Establishment Clause of the First Amendment, are the courts advancing liberty or retraining the liberty of we the people in the states who supported the law being struck down by federal judges? Why not look to state constitutions as the source of our rights against our own state government?

Dred Scott and SDP

Let's take a careful look at the quote from Justice Taney's opinion in *Dred Scott* on page 413-414. Here is how one commentator reads those two sentences.

> The first sentence quotes the guarantee of due process, which is simply a requirement that the substance of any law be applied to a person through fair procedures by any tribunal hearing a case. The clause says nothing whatever about what the substance of the law must be. But Taney's second sentence transforms this requirement of fair procedures into a rule about the allowable substance of a statute. The substance Taney poured into the clause was that Congress cannot prevent slavery in a territory because a man must be allowed to bring slaves there. The second sentence is additionally dishonest because it postulates a man who had "committed no offence against the laws," but a man who brings slaves and keeps them in a jurisdiction where slavery is prohibited does commit an offense against the laws. Taney

was saying that there can be no valid law against slaveholding anywhere in the United States.

What are your thoughts?

Paulsen Book

Please be sure to focus on Chapters 6, 7 & 8 of the Paulsen book as we move into our discussion of the Civil War Amendments (13th, 14th & 15th). In particular, focus on how the issues of slavery and racial equality have shaped constitutional history as well as the explicit text of the Constitution.

Slaughterhouse and the P & I Clause of the 14th Amenment

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The Court interprets this clause very narrowly in some respects--see p. 418-420--protection when on the high seas, writ of habeas corpus, right to use navigable waters of the United States.

But importantly, the right of a citizen of the United States "of his own volition" to "become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."

This, of course, was aimed directly at the *Dred Scot*t decision--all persons, including the former slaves, if born in America, are not only citizens of the United States, but they also have the right to become an equal citizen of any state of their choosing. Citizens choose states, states don't choose citizens.

This is an extremely important privilege of United States citizens that no state may abridge.

P&I Clause and Resident Tuition

Harvey Grutz III (known in the family as "Harvey three sticks") is a 29 year old married father of 3. He graduated from the University of South Dakota and spent 8 years teaching in the South Dakota public schools. He recently decided to go back to school and was accepted at UNL College of Law.

He moved to Nebraska with his wife, a stay-at-home mom, and his children. He bought a house in Lincoln, acquired a Nebraska driver's license,

enrolled his children in Lincoln public schools, became a member of Berean Church in Lincoln, registered to vote and voted in the November general election in Nebraska, got a part-time job in Nebraska, and pays taxes in Nebraska using the "Resident" tax form.

He sounds a lot like some of you. No?

He filed a request at UNL to be classified as a Nebraska resident for purposes of paying tuition, but his request was denied because he is a full time student who moved to Nebraska to attend law school.

At the same time, the state allows undocumented aliens, who although unlawfully in the country nevertheless graduated from a Nebraska High School, to pay in-state tuition

Does this treatment violate Harvey three sticks' rights under the P&I Clause of the 14th Amendment?

Be prepared to argue both sides of this case in class.

Here is a link to the current UNL policy.

Nebraska Residency For In-state Tuition

You will be classified as a non-resident if:

- You are not attending a Nebraska high school
- Or, you are not a graduate of an accredited Nebraska high school

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Qualifying for Residency Status For The Purpose of In-State Tuition

- Persons of legal age (19 or older) or emancipated minors who:
    1. have established a home in Nebraska for at least 12 months.*
    2. AND can verify by documentation that he/she intends to make Nebraska their permanent residence.
- Dependent students whose parent/guardian has established a home in Nebraska.
- Persons who are married to Nebraska residents who had established a home in Nebraska prior to the marriage.
- Permanent resident aliens or individuals who have been granted asylum or refugee status and who have established a home in Nebraska for at least 12 months.

- Dependents or spouses of permanent university, state college, or community college employees in the State of Nebraska who have at least part-time (.5 FTE) employment status.
- Active duty military personnel and their dependents whose permanent duty station or home of record is in Nebraska.
- Persons who graduated from an accredited high school in Nebraska and were legal residents of Nebraska at the time of graduation.
- Individuals who previously attended the University of Nebraska or one of the Nebraska state colleges as a resident within the last two years.
- Individuals, and their spouses and dependents, who were recruited for full-time employment to the state of Nebraska because of their special talents or skills.
- Members of tribes who live outside the state of Nebraska qualify for in-state tuition rates upon providing documentation of membership.
- You need to apply for residency classification in order to determine if you qualify for in-state tuition.

NOTE: *Individuals who move to Nebraska primarily to enroll in a post-secondary institution in Nebraska will be considered a non-resident for tuition purposes for the duration of his/her attendance.

Privileges and Immunities Clause of Article IV

Privileges and Immunities Clause of Article IV

Article IV generally is designed to ensure that the *U*nited States is one Nation and that state sovereignty should not be so extreme as to destroy national identity.

Article IV, §2 provides:

“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

The purpose of this provision is to protect the citizens of State A from being treated like aliens, like foreign nationals, when they visit State B. It's like a

special kind of equal protection clause protecting citizens of one state when they visit another state.

State B must treat citizens of State A as welcome visitors, not as illegal aliens. The Court has said that when State B discriminates against citizens of another state the issue is whether the interest is "sufficiently fundamental to the promotion of interstate harmony." 465 U.S. at 218.

14th Amendment

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United

States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Dred Scott and the Masks of the Law

Here is something I have been working on concerning the way the law uses legal masks to conceal persons:

> One of the great constitutional law scholars of the past fifty years, Judge John T. Noonan, has observed that “[i]t is a propensity of professionals in the legal process to dehumanize by legal concepts those who the law affects harshly.”
>
> He calls this process of dehumanization the “masks of the law.”
>
> What Noonan meant by the masks of the law is the law’s ability to use rules and legal concepts to conceal persons who are treated harshly by the law. He puts it this way:

“By masks in this context I mean ways of classifying individual human beings so that their humanity is hidden and disavowed.”

The mask that the legal system used to disavow the human dignity of slaves was the mask of “property.” The mask of “property” was what allowed champions of liberty, such as George Wythe and Thomas Jefferson, to own slaves and to accept the power of the law to treat slaves harshly.

For example, as a judge in the state of Virginia, George Wythe, a signer of the Declaration of Independence and its embrace of all men being created equal, was able to preside over the sale and inheritance of slaves and to declare in one case that “The property of slaves, whatever be their number, may be transferred with as little judicial ceremony as a single quadruped or article of house or kitchen furniture.”

As Noonan observes, Wyeth “could not have compassion for each of them as a person and still be a judge.... At the critical moment, the masks of the law covered the faces of the slaves.”

Montesquieu, with biting irony, explained even more clearly the need for the masks of the law in an age of slavery:

‘It is impossible,” said Montesquieu, “that we should suppose those people to be men, because if we should suppose them to be men, we would begin to believe that we ourselves are not Christians.”

This mask of the law has a dual function—it hides the humanity of the slaves, so judges and the law can treat them like an animal or an inanimate chair, and it allows the white ruling classes to think well of themselves by masking the tyranny of the system they enforce.

> “We are not evil men! We are good men, lovers of liberty and equality, and protectors of private property and the pursuit of happiness!”

Do you see this point about the masks of the law, and how they permit good men to commit grave injustices while still feeling good about themselves?

Always try to peek behind the masks of the law and see clearly whatever or whoever is concealed by these masks.

Question About Dred Scott

Is *Dred Scott* an originalist decision?

Or is it the product of the "living constitution?"

Is substantive due process even a plausible reading of the Due Process Clause?

The Living Constitution is unrestrained by the Written Constitution. It can give you decisions that are your most cherished dreams, or decisions that are you greatest nightmares.

Whereas the original Written Constitution says what it says and doesn't say what it doesn't say.

McDonald and Incorporation of the Second Amendment

1. Notice that the challengers argued that the Court should incorporate the 2d Amendment under the Privileges or Immunities Clause rather than the Due Process Clause. What is this issue all about? See p. 424.

2. Notice that even under the Due Process Clause the Court disagreed as to the appropriate test for incorporation and "fundamentalness."

3.Notice that the City of Chicago argued that the test for a fundamental right should be to whether "it is possible to imagine any civilized legal system that does not recognize a particular right." If this test were applied to all Bill of Rights incorporation cases, how many of the Amendments would not be fundamental? Right to counsel?Establishment Clause? Free Speech Clause? Right of accused not to be compelled to testify in criminal proceeding?

4. The Court instead applied the the governing standard used in other incorporation cases: "whether a particular Bill of Rights guarantee is fundamental to *our* scheme [i.e. the American scheme] of ordered liberty and system of justice" or "whether the right 'is deeply rooted in **this Nation's** history and tradition.'" p. 443-444.

Make sure you understand the difference? Which test do you think is the better one? Why? Should Justices use a more lenient test for Bill of Rights provisions they like and a more strict test for liberties they dislike?

Of course, since the Due Process Clause was not designed to incorporate the Bill of Rights, one person's subjective test is just as good as another person's subjective test. Just count the votes.

This is why Justice Thomas wanted to look to original meaning originalism and ask "what 'ordinary citizens' at the time of ratification would have understood the Privileges or Immunities Clausze to mean..." p. 450.

If the one pervading purpose of the 14th Amendment was protection of the newly freed slaves, what does that tell us about the fundamental nature of the right to bear arms at the time of ratification? See more Thomas at p.450.

Standards of Constitutional Review

When Space Law takes over the entire curriculum of the Law College, and the Dean allows me only one hour to teach Constitutional Law, this is what I will teach:

STANDARDS OF REVIEW

I. **MINIMAL SCRUTINY (DEFERENCE)**

Rational Basis Test - The government restriction need only be rationally or conceivably related [Means] to any legitimate state interest [Ends].

II. **INTERMEDIATE SCRUTINY (SKEPTICISM)**

Intermediate Scrutiny Test - The government restriction must serve important governmental objectives [Ends] and must be substantially related to the achievement of those objectives [Means]. ["Intermediate scrutiny always asks is there some less restrictive alternative available?" Epstein, Takings at 138.]

III. **STRICT SCRUTINY (CYNICISM)**

The governmental restriction must be necessary [the Least Restrictive Means] to achieve a compelling state interest [Ends].

CHART

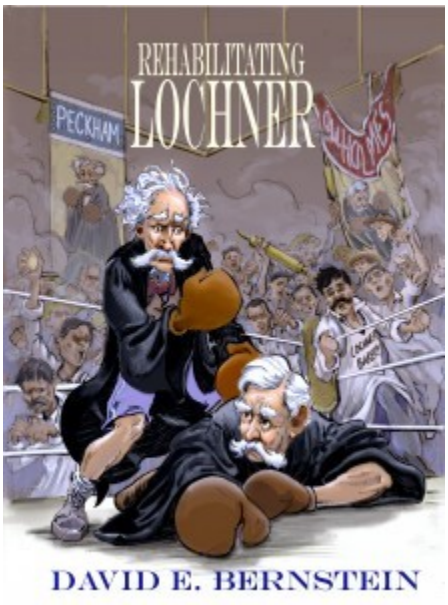
MEANS	ENDS
I. Rationally Related	Any Legitimate State Interest
II. Substantially Related	Important Governmental Objective
III. Necessary	Compelling State Interest

[The Ends are the purposes sought to be advanced (e.g. health and safety). Means are the methods chosen to accomplish those ends.]

See Nowak at 357: "Where the government seeks to deprive persons of fundamental rights, it must prove to the Court that the law is necessary to promote a compelling or overriding interest. Where no such right is restricted, the law need only rationally relate to any legitimate end of government. As long as there is any conceivable basis for finding such a rational relationship, the law will be upheld. Only when a law is a totally

arbitrary deprivation of liberty will it violate the substantive due process guarantee.”

Lochner and Public Morality



Did *Lochner* hold that public morality is not a legitimate basis for laws designed to protect the rights of employees or to achieve social justice?

Take a look at this passage on p. 469:

"The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of persons or the right of free contract, by determining the hours of labor, in the occupation of a baker."

Do you agree that it is illegitimate for the government to regulate business based upon the Legislature's understanding of public morality and social justice?

Now consider Justice Holmes's famous dissent on p. 472: "The 14th

Amendment does not enact Mr. Herbert Spencer's Social Statics."

What does that mean?

Does the 14th Amendment enact any other particular ideology? For example, would you agree with Justice Holmes if he had said: "The 14th Amendment does not enact Mr. Vatsyayana's *Kama Sutra* nor Mr. Hefner's Playboy Philosophy?"

Or *does* the 14th Amendment codify the *Kama Sutra*? Be patient. We shall see.

New Rights and Common Law Growth

In his book, *A Matter of Interpretation*, Justice Scalia describes the Living Constitution as:

> [A] body of law that…grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and 'find' that changing law.…Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures.

One of the problems with a Court creating a new, non-textual fundamental liberty is the inevitable growth of that new right to its logical conclusion.

The right of parents to educate their children can become the right of a married couple to decide to use birth control can become the right of anyone--married or single--to use birth control can become the right of a women to abort a pregnancy at any stage during gestation can become the right of consenting adults to engage in sexual relationships of any kind can become the right of anyone to marry anyone else can become the right of consensual plural marriage can become the right of consenting adults to have sex in exchange for cash considerations can become.....

Incredibly Shrinking Tenth Amendment Alert

Notice how these new judge-made rights further erode federalism by

shifting the power to decide these issues away from we the people in the states acting through the democratic process of self-government to "They the Justices" deciding these issues at the national level and striking down state laws and state-created liberties that conflict with the Supreme Court's preferences.

Consider what Greve says in Real Federalism:

Every new federal right and every expansion or extension of an existing federal right correspondingly diminishes the authority of state and local governments (and of private parties) to see to their own affairs. Federal rights flatten the differences among the states and replace federalism's competitive dynamics with universal rules, regardless of whether the rights are created by Congress or by the federal judiciary.... (p.62)

Moreover, this shrinking of the Tenth Amendment has occurred in the arena of family law and domestic relations, areas that are at the core of the Tenth Amendment and outside the normal scope of national power.

SDP--From Dred Scott to Lochner to Roe v. Wade & Obergefell

I often say that if Substantive Due Process ("SDP") is a legitimate source of recognizing fundamental constitutional rights that trump laws enacted by Congress and state legislatures, then *Dred Scott* and *Lochner* and *Roe v. Wade* are all equally legitimate examples of constitutional law. You may agree or disagree with the particular liberty the Court has constitutionalized (the right to travel with slaves, the right to contract free of state interference, the right of abortion), but when you endorse SDP you endorse the power of the Court to amend the Constitution based upon its judgment of which liberties are fundamental and which are not. No need to seek ratification by we the people in three-fourths of the states for the new constitutional order; all it takes is at least a 5 to 4 vote of the Supreme Court.

Justice Scalia has put it much better than I ever could. Here are some of Scalia's insights from the wonderful new collection of his lectures, *Scalia Speaks (p. 211-212 & 229).*

> *Virtually complete liberation from the text of the Constitution was achieved by a distortion of the Due Process Clause.…It is self-evidently a procedural, rather than a substantive, guarantee. Can one be deprived of life. Yes, but not without due process of law—which includes proper enactment of the law that was allegedly violated, and conviction beyond a reasonable doubt by a jury. And the same for liberty and property—one can be deprived of them, but not without due process.*
>
> *This doctrine [of SDP] prescribes that some liberties are so fundamental that they simply cannot be taken away, no matter what procedure is followed. It is up to the Court, of course, to decide which particular liberties are entitled to this extraordinary protection. By a stroke of the pen, "substantive due process" gave the Court power to make all sorts of additions to the Bill of Rights, literally unencumbered by any textual limitation.*
>
> *….[W]hat the living Constitution prescribes does not depend on any consensus of state laws, but on the judgment of the Justices. Do you think that judges (that is to say, lawyers) are better at the science of What Ought to Be {than are the people]. The living constitutionalist is a happy fella, because it turns out that the Constitution always means precisely what he thinks it ought to mean.…How wonderful to think that whatever you care passionately about---from abortion to the death penalty—is resolved precisely the way you think it should be by the Constitution. Never mind whether the people ever voted to put that in the Constitution and thus to remove it from the realm of democratic choice…It is there if it ought to be there.*

My point about the Rule of Law and SDP is that if Supreme Court decisions are based upon the moral and policy preferences of the Justices and not upon the ratified text of the Written Constitution, then SCOTUS decrees constitute the Law of Rulers, not the Rule of Law. The motto "Here the People Rule" becomes "Here the People are Ruled by an elite body of lawyers."

Some may prefer being ruled by the wisest among us to being ruled by a self-governing free citizenry. But if so, even if you like *Roe & Obergefell*, remember *Dred Scott & Lochner* have the same pedigree.

SDP is a shape-shifting trump card that can change its stripes on command by a 5 to 4 majority of the Supreme Court.

Lochner's Bakery

Here

The "Ink Blot" of the Bill of Rights

The Ninth Amendment provides:"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

What does this enigmatic amendment mean? In *Griswold*, Justice Goldberg's concurring opinion asserted that it is a guarantee of "fundamental personal rights...protected from abridgment by the Government though not specifically mentioned in the Constitution." He reads the 9th Amendment as though it said: "The federal courts are empowered to declare any national, state or local law or policy unconstitutional if the judges believe such laws or policies violate any fundamental liberty the judges choose to recognize." Do you believe this is what the People believed they were ratifying in 1791?

How do the judges know which liberties are in and which are out? Do they look to the natural law for guidance? Whose version of the natural law? Robert Bork said this reading of the 9th Amendment substitutes the rule of man (judges) for the rule of law. Here is what he said:

> "I do not think that you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an ink blot and

> you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot."

What do you think he means by this statement? Bork explains: "The judge who cannot make out the meaning of a provision is in exactly the same circumstance as a judge who has no Constitution to work with."

Although no one knows with certainty the precise meaning of the Ninth Amendment, history suggests that it was designed--along with the 10th Amendment--to make clear that the national government is a government of strictly limited powers and that the ratification of the first eight amendments should not be read as implying that the national government is granted any additional powers. For example, here is Madison's explanation:

> "It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power [to the national government], it would disparage those rights which were not placed in the enumeration; and it might follow by implication, that those rights that were not placed in that enumeration, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure." (1 Annals of Cong. 439 (1789)).

If Madison's views are to be believed, then the Ninth and Tenth Amendments are federalism provisions designed to make clear that the Federal Government was a government of strictly limited powers and to protect *state-created rights against federal interference*. Prof. Caplan puts it this way:

> "Both Hamilton and Madison are clear that unenumerated rights refer to the laws of the several states, not to anterior, transcendant federal norms. Ninth Amendment rights, therefore, because they are state rather than federal in character, cannot form a basis for holding acts of Congress unconstitutional. Nor is it logically possible to 'incorporate' the ninth amendment through the fourteenth to apply as a prohibition against the states, because the ninth amendment was designed not to circumscribe but to protect the enactments of the states.."

Under this view, the real source of our liberties in an ever-changing world is democratic self-government at the state and local level. Our true Ninth Amendment rights are those found in our state constitutions and in laws enacted by our democratically-elected state and local officials.

For example, if the Court in *Griswold* had declined to recognize a Constitutional right for a married couple to use birth control, what do you suppose would the law of Connecticut be today? Think about this for a minute! In a world in which public schools are handing out condoms, as though they were candy, to young boys and girls, do you really think birth control would still be denied to *married couples*! As values and circumstances change, laws change.

Do the people of Connecticut need the federal courts to legislate new rights on their behalf? Or as a free and self-governing people are they perfectly capable of enacting laws they believe are good, and repealing laws they believe are unwise?

Although Justice Goldberg toyed with the idea of using the 9th Amendment as an empty vessel for the creation of judge-made constitutional law, the 9th Amendment has never been incorporated or employed by a Supreme Court majority to strike down any law. It remains an enigma, but one that an activist Court could use as a useful tool to strike down any law the Court doesn't like at any particular time.

Some commentators argue that the federalist view of the Ninth Amendment is questionable because "it renders the Ninth Amendment synonymous with the Tenth and thus redundant." See Ides & May at 76.

My response is to point out that the Ninth and Tenth Amendments, although complementary, serve very different functions and thus are neither synonymous nor redundant.

The Ninth Amendment is designed to specifically deny implied powers to the National Government (i.e.to make clear that the National Government is a government of strictly limited powers and that the ratification of the first eight amendments should not be read as implying that the National Government is granted any additional powers over unenumerated subjects).

The Tenth Amendment does not limit any implied powers of the National Government; it simply makes clear that powers not granted to the feds are reserved to the states.

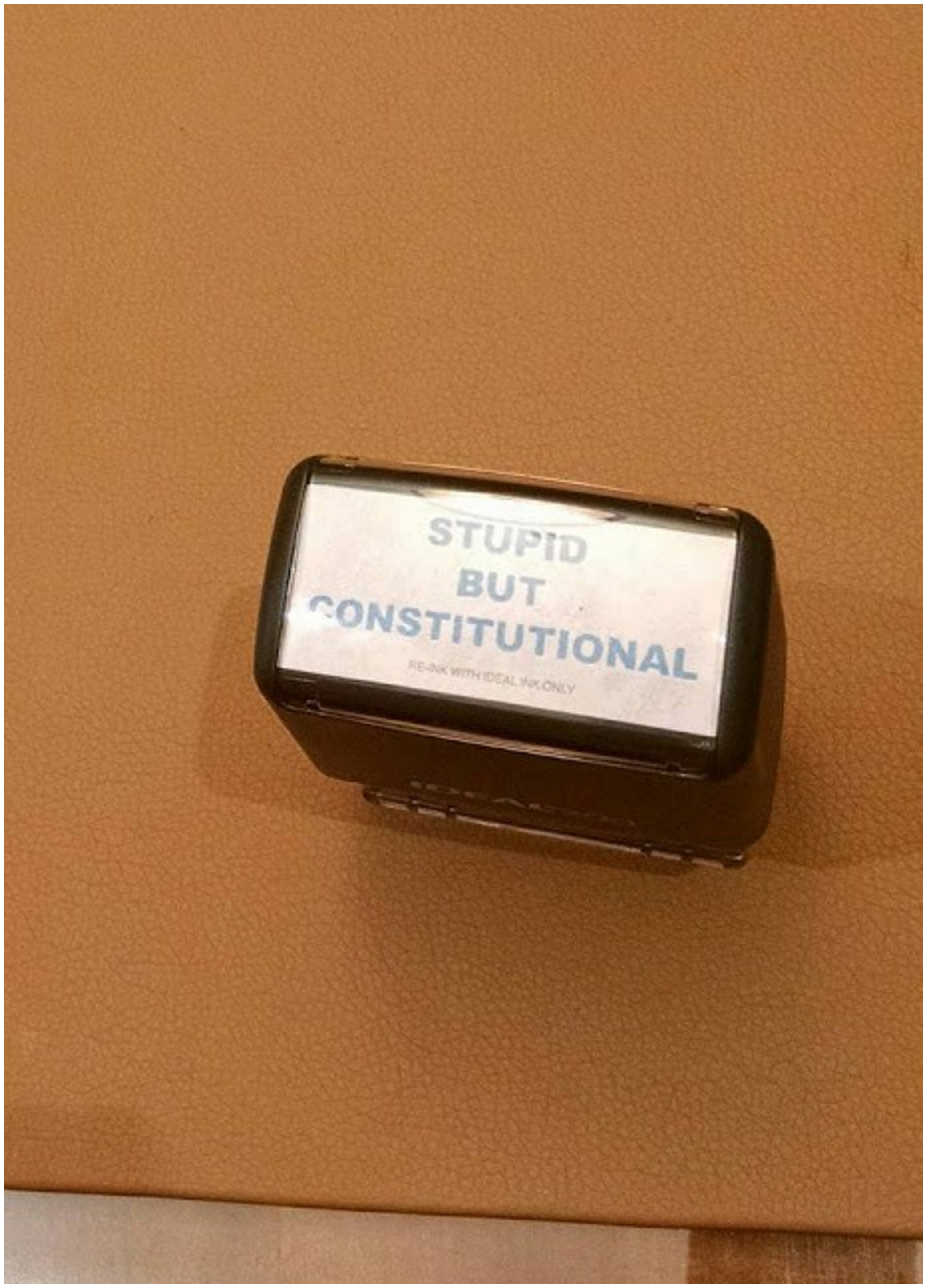
In other words, the Ninth Amendment limits certain federal powers (by explicitly denying implied power) and the Tenth Amendment makes clear that whatever is not granted to the feds is reserved to the states. Here is

how Prof. Amar explains this point in his seminal book, **The Bill of Rights** (at p.123-124):

"*To be sure, on a federalism-based reading, the Ninth and Tenth fit together snugly, as their words and their legislative history make clear; but each amendment complements the other without duplicating it. The Tenth says that Congress must point to some explicit enumerated power before it can act; and the Ninth addresses the closely related but distinct question of whether such express or implied enumerated power in fact exists.*"

See also Michael McConnell's recent article on the Ninth Amendment (link).

Griswold: A Few Comments and Questions



Justice Scalia's Rubber Stamp (photo by his son, Chris)

"Please don't emanate in the penumbras" --SCOTUS blog

For all its talk about penumbras and emanations, *Griswold* is a Substantive Due Process/*Lochner*-type decision in which the Court decided that "privacy in marriage" is a fundamental right protected by the Constitution. By the time it decides *Roe*, the Court frankly admits that SDP is the source of the non-constitutional, Constitutional right of privacy.

But privacy to do what? Do unmarried people have a right of "marital privacy" to use contraceptives? Yes, I guess that makes it non-marital, marital privacy! *See Eisenstadt* v. *Baird,* casebook at 583.

Does the Constitution allow "the police to search the sacred precincts of the marital bedroom" for illegal drugs, or guns, or other contraband? Of course, so long as they get a warrant or otherwise comply with the Fourth Amendment! I guess the marital bedroom is not so sacred after all!

Is the *Griswold* Court an "activist" Court?

Of course not-- Justice Douglas explicitly informed us that: "We [the Court] do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." As the Bard might have said, "The lady doth protest too much, methinks."

Whenever the Court feels compelled to deny it is being activist, that is a great marker of an activist decision that is about to follow.

By the way, this is not to say that "silly" state laws banning contraception are good policy. It is simply to recognize that these policy questions are left to state legislatures and state constitutions under the Tenth Amendment, not to the Supreme Court under the Written Constitution.

Not all bad laws are constitutionally prohibited; and not all good laws are constitutionally required.

Indeed, Justice had a rubber stamp that said : "STUPID BUT CONSTITUTIONAL."

Was the Lochner Court Guilty

of judicial activism?

If yes, why?

If no, why not?

By the way, what standard of review did the *Lochner* court apply--strict scrutiny (compelling interest test) or the rational basis (reasonable basis) test? Here are the choices:

I. MINIMAL SCRUTINY (DEFERENCE)

Rational Basis Test - The government classification need only be rationally or conceivably related [Means] to any legitimate state interest [Ends].

II. STRICT SCRUTINY (CYNICISM)

The governmental restriction must be necessary [Means] to achieve a compelling state interest [Ends].

Prof. Nowak explains how these tests are designed to distinguish between "fundamental" liberties and ordinary liberties: "Where the government seeks to deprive persons of fundamental rights, it must prove to the Court that the law is necessary to promote a compelling or overriding interest. Where no such right is restricted, the law need only rationally relate to any legitimate end of government. As long as there is any conceivable basis for finding such a rational relationship, the law will be upheld. Only when a law is a totally arbitrary deprivation of liberty will it violate the substantive due process guarantee."

Lord Voldemort: Supporter of Government Education & Enemy of Home Schooling

In the last volume of Harry Potter, one of the first things Lord Voldemort did after seizing power over the Ministry of Magic was to ban home schooling and parental choice and require attendance at Hogwarts,the government school for witchcraft and wizardry. Here is the relevant passage (p. 210):

"'What's Voldemort planning for Hogwarts?' she [Hermione] asked Lupin. 'Attendance is now compulsory for every young witch and wizard,' he replied. 'That was announced yesterday. It's a change, because it was never obligatory before. Of course, nearly every witch and wizard in Britain has been educated at Hogwarts, but their parents had the right to teach them at home or send them abroad if they preferred. This way, Voldemort will have the whole Wizarding population under his eye from a young age.'"

Query: would Voldemort vote with the majority or the dissent in *Pierce* v. *Society of Sisters*? Do you see how a government monopoly over the education of children is at least a potential threat to fundamental liberties of thought, belief, family, and faith? This is a nice illustration of the point JS Mill made in On Liberty.
By the way, for another post from my Property Class blog concerning Harry Potter see this link.

Medium Rare Scrutiny:

We will soon be studying and analyzing the three (or perhaps more) standards of review the Supreme Court employs in analyzing the constitutionality of laws that burden protected liberty interests or which discriminate against certain groups or classes. I mentioned Mike Paulsen's wonderful (and short) article that uses the analogy of barbecuing steak to help us understand the various levels of constitutional review created by the Supreme Court. As Orwell might have said, "all constitutional rights are equal, but some are more equal than others."

Although I am not assigning the article, you may enjoy it and find it helpful.

Here is the citation:

Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 Const. Comm. 397 (1998)(Hein online)

Conservative Living Constitutionalism

As we conclude our discussion of the *Lochner* era, let me ask you to think about this.

If proponents of a "common law," judge-made, Living Constitution are correct, what would you think about a 6 to 3 conservative Court practicing living constitutionalism?

Which conservative policy positions might be constitutionalized and imposed on Congress and on all 50 states by an activist Court interpreting the Constitution based upon what conservatives think it ought to be? Economic policies, tax policies, immigration policies, environmental policies?

The Justice Doth Protest Too Much Methinks

One clear sign of an activist opinion is when the Court goes out of its way to deny it is activist. Here are two wonderful examples:

1. *Lochner* p. 469: "This is not a question of substituting the judgment of the court for that of the legislature."

2. *Griswald* p. 538: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."

It is fun to watch for these guilty denials of activism in SCOTUS opinions. It is a sure sign that the Court is doing exactly what it says it is not doing.

Birthright Citizenship and Chirldren Born to Illegal Immigrfants

This is not an area that I have taught or reserached, so I donave an informed opinion about this. But here are some sources:

14th Amendment

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Lindsey Graham Verified account @**LindseyGrahamSC**

In addition, I plan to introduce legislation along the same lines as the proposed executive order from President **@realDonaldTrump**.

Ben Shapiro Article

See also Slaughterhouse at p. 417: "The phrase, 'subject to its jurisdiction' was in tended to exclude from its operation chiuldren of ministers, consuls, and citizens or subjects of foreign States born within the United States."

And here is a post from Jack Balkins blog:

> **Birthright Citizenship and the 14th Amendment**
>
> Gerard N. Magliocca
>
> Michael Anton is a former official in the Trump Administration. He is best known for writing (under the pseudonym Publius Decius Mus) the "Flight 93" essay during the 2016 presidential campaign, in which he slandered the memories of the passengers of that doomed flight on September 11th, 2001 by comparing their courage to people who should vote for Donald Trump.

In today's *Washington Post*, Anton celebrates the 150th anniversary of the Fourteenth Amendment by distorting its first sentence. In "Citizenship Shouldn't Be A Birthright," Anton argues that the original understanding of that text excludes people born here to illegal immigrant parents from citizenship. Section One of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States thereof . . ." Anton says that "subject to the jurisdiction" means "not owing allegiance to another country," which would thus exclude children born here to illegal immigrant parents. (Why children born here owe their allegiance to another country is not explained, but that's just one of the many problems with Anton's article.)

I wrote a law review article ten years ago explaining why Anton's argument is wrong. You can read that paper here. "Subject to the jurisdiction," means exactly what you would think from reading that phrase--"subject to American law." Illegal immigrants are, of course, subject to American law. That is why they can be deported. And why their children born here are citizens.

Suppose you are not convinced by my article. After all, I don't support President Trump. So I give you Judge James Ho, named by the President to the Fifth Circuit last year. Judge Ho has impeccable originalist credentials, as a law clerk to Justice Thomas, the Solicitor General of Texas, and a leading private practitioner before he took the bench. When he was in practice, Judge Ho demolished the Anton argument is a couple of published articles (such as here and here). Look at a key passage:

Proponents of ending birthright citizenship claim that aliens--lawful and unlawful--are not "subject to the jurisdiction" of the U.S. because they swear no allegiance to the United States. But neither the text nor the history of the 14th Amendment supports this conclusion.
When a person is "subject to the jurisdiction" of a court of law, that person is required to obey the orders of that court. The meaning of the phrase is simple: One is "subject to the jurisdiction" of another whenever one is obliged to obey the laws of another. The test is obedience, not allegiance.

The "jurisdiction" requirement excludes only those who are not required to obey U.S. law. This concept, like much of early U.S. law, derives from English common law. Under common law, foreign diplomats and enemy soldiers are not legally obliged to obey our law, and thus their offspring are not entitled to citizenship at birth. The 14th Amendment merely codified this common law doctrine.

Members of the 39th Congress debated the wisdom of guaranteeing birthright citizenship --but no one disputed the amendment's meaning.

> Opponents conceded--indeed, warned -- that it would grant citizenship to the children of those who "owe [the U.S.] no allegiance." Amendment supporters agreed that only members of Indian tribes, ambassadors, foreign ministers and others not "subject to our laws" would fall outside the amendment's reach.
>
> Thus, Anton's claim that "judges faithful to their oaths will have no choice but to agree" that birthright citizenship does not extend to the children born here to illegal immigrant parents is preposterous. Mr. Anton is free, like anyone else, to support for a constitutional amendment that restricts birthright citizenship. He cannot, though, escape the truth that the Constitution as written rejects his view.

The Living, "Common Law" Constitution and How it Grows and Grows

In his book, *A Matter of Interpretation*, Justice Scalia describes the Living Constitution as:

> "[A] body of law that…grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and 'find' that changing law.…Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures." [at p. 38]

In other words, the Supreme Court's Living Constitution is the common law on steroids—the Barry Bonds' version of the common law, a common law that trumps the laws of all 50 states and even acts of Congress.

Let's trace the "common law" constitutional right of privacy and see how it ended up constitutionalizing abortion on demand throughout the entire 40 weeks of pregnancy and struck down the laws of all 50 states!

Roe and "Sex Selection" Abortions

Under *Roe*, may the state prohibit abortions performed to terminate a pregnancy because of the gender of the unborn child? In other words, under *Roe* does a woman's right to choose an abortion include the right to abort

for any reason she chooses, including the gender of the unborn child?

Consider this excerpt from an article in the Boston Globe:

> Population experts have documented for years the use of abortion for sex selection in regions of the world where sons are more highly prized than daughters.
> The problem is particularly acute in Asia, and especially in China and India, the world's two largest countries.
> The natural sex ratio at birth is slightly male-biased at roughly 1.05-to-1, meaning that about 105 boys are born for every 100 girls. But in China the current ratio at birth is about 120 boys per 100 girls - and in more prosperous parts of the country, such as Guangdong and Hainan, the imbalance has reached an even more lopsided 135-to-100.
> In India, census data from 2001 show that among children younger than 6, there are just 927 girls per 1,000 boys. There too, the greater the prosperity, the greater the discrepancy: In the high-income state of Punjab, notes Joseph D'Agostino of the Population Research Institute, there are only 793 girls for every 1,000 boys. He cites a report by UNICEF, which calculates that "7,000 fewer girls are now born in India each day than nature would dictate, and 10 million have been killed during pregnancy or just after in the past 20 years."
> There is nothing new about the high cultural premium placed on sons in developing countries. What is relatively new is easy access to cheap ultrasound scans for determining the sex of an unborn child, and the availability of inexpensive abortions for parents who don't want a baby of the "wrong" sex.
> Consider Vietnam, where a decade ago the sex ratio of newborns was a normal 1.04-to-1. Today, with the rise of ultrasound and abortion clinics, the number of newborn males has surged ahead of females. "Vietnamese women who find they are carrying an unwanted female baby often head immediately to an abortion clinic," the Straits Times of Singapore reported last fall. "A walk-in abortion at a state hospital can be performed for $10, and at private clinics for about $20."
> Most Americans rightly regard sex-selective abortions as odious; in a 2006 Zogby poll, an overwhelming 86 percent of Americans agreed that such abortions should be illegal.

Are sex selection abortions covered by *Roe's* abortion liberty?

What about race selection abortions? Permissible under *Roe*?

Suppose a woman discovers that the child she is carrying is a Downs Syndrome baby. Is it permissible to abort a child because it has a disability?

Would a law prohibiting abortions performed because of the unborn child's race, gender, or disability violate *Roe* and the abortion liberty?
What is your answer? Explain.

Roe and State-created Unenumerated Rights

Can *Roe* v. *Wade* be viewed as a decision in which the Court refused to recognize a **state-created** unenumerated right--the right to life of unborn persons--under the 9th Amendment? In other words, some view *Roe* as a case in which the Court refused to follow a 9th Amendment "unenumerated" right because it conflicted with the Justices' own idea of a "fundamental" Substantive Due Process right to abortion.

Which unenumerated rights are the legitimate ones? Who decides? And how do they know?

How did the Court know that Texas' interest in protecting the right to life of living human beings in the womb became compelling only when the "potential life" becomes "viable?"

Is the viability rule a little like Catch 22 in the sense that the state's interest in protecting an unborn human life in the womb becomes compelling only after the child no longer needs to be protected in the womb (because he or she has reached the point of viability, the point at which it could survive outside the womb)?

What does it mean to say that a living, unborn child is only a "potential life?" Does it mean that the unborn child is not alive? Not human?

Be sure to watch for the "masks" of the law as you read *Roe* and *Casey*.

A potential (future) X must in the present be an actual Y? What does science teach about whether the unborn offspring of two human beings is both alive and human? If an unborn child is both alive and human, is it accurate to refer to him or her as only a "potential life?"

These are the kinds of questions that haunt me when I re-read *Roe* for maybe the 1000th time.

Is Roe v. Wade an "Activist" Decision?

Here is a way to think about *Roe* v. *Wade* and whether it is an activist decision by the Supreme Court. Think about this—was there **ever** a time in American history when three-fourths of the States would have ratified a constitutional amendment proposing the abortion liberty as created by the Court in *Roe*? Ever?

If you can't imagine 38 states *ever* ratifying a constitutional doctrine such as the Court's abortion jurisprudence, what does that say about whether *Roe* is legitimate constitutional law?

Nebraska Fetal Homicide Law

28-388. Act, how cited.

Sections 28-388 to 28-394 shall be known and may be cited as the Homicide of the Unborn Child Act.

28-389. Terms, defined.

For purposes of the Homicide of the Unborn Child Act, unless the context otherwise requires:

(1) Premeditation means a design formed to do something before it is done; and

(2) Unborn child means an individual member of the species Homo sapiens, at any stage of development in utero, who was alive at the time of the homicidal act and died as a result thereof whether before, during, or after birth.

28-390. Applicability of sections.

Sections 28-391 to 28-394 do not apply to an act or conduct causing or contributing to the death of an unborn child when the act or conduct is:

(1) Committed or engaged in by the mother of the unborn child;

(2) Any medical procedure performed with the consent of the mother; or

(3) Dispensing a drug or device in accordance with law or administering a drug or device prescribed in accordance with law.

28-391. Murder of an unborn child in the first degree; penalty.

(1) A person commits murder of an unborn child in the first degree if he or she in committing an act or engaging in conduct that causes the death of an unborn child, intends, with deliberate and premeditated malice, to kill the unborn child or the mother of the unborn child with knowledge of the pregnancy.

(2) Murder of an unborn child in the first degree is a Class IA felony.

28-392. Murder of an unborn child in the second degree; penalty.

(1) A person commits murder of an unborn child in the second degree if he or she, in committing an act or engaging in conduct that causes the

death of an unborn child, intends, but without premeditation, to kill the unborn child or another.

(2) Murder of an unborn child in the second degree is a Class IB felony.

28-393. Manslaughter of an unborn child; penalty.

(1) A person commits manslaughter of an unborn child if he or she (a) kills an unborn child without malice upon a sudden quarrel with any person or (b) causes the death of an unborn child unintentionally while in the perpetration of or attempt to perpetrate any criminal assault, any sexual assault, arson, robbery, kidnapping, intentional child abuse, hijacking of any public or private means of transportation, or burglary.

(2) Manslaughter of an unborn child is a Class III felony.

28-394. Motor vehicle homicide of an unborn child; penalty.

(1) A person who causes the death of an unborn child unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide of an unborn child.

(2) Except as provided in subsection (3) of this section, motor vehicle homicide of an unborn child is a Class I misdemeanor.

(3)(a) If the proximate cause of the death of an unborn child is the operation of a motor vehicle in violation of section 60-6,213 or 60-6,214, motor vehicle homicide of an unborn child is a Class IV felony.

(b) Except as provided in subdivision (3)(c) of this section, if the proximate cause of the death of an unborn child is the operation of a motor vehicle in violation of section 60-6,196 or 60-6,197.06, motor vehicle homicide of an unborn child is a Class IV felony and the court shall, as part of the judgment of conviction, order the person not to drive any motor vehicle for any purpose for a period of at least sixty days and not more than fifteen years after the date ordered by the court and shall order that the operator's license of such person be revoked for the same period. The revocation shall not run concurrently with any jail term imposed.

(c) If the proximate cause of the death of an unborn child is the operation of a motor vehicle in violation of section 60-6,196 or 60-6,197.06 and the defendant has a prior conviction for a violation of section 60-6,196 or a city or village ordinance enacted in conformance with section 60-6,196, motor vehicle homicide of an unborn child is a Class III felony and the court shall, as part of the judgment of conviction, order the person not to drive any motor vehicle for any purpose for a period of at least sixty days and not more than fifteen years after the date ordered by the court and shall order that the operator's license of such person be revoked for the same period. The revocation shall not run concurrently with any jail term imposed.

Roe, Casey and the "Masks of the Law"

Remember our discussion of *Dred Scott* and the "masks of the law."
One of the great constitutional law scholars of the past fifty years, Judge John T. Noonan, has observed that “[i]t is a propensity of professionals in the legal process to dehumanize by legal concepts those who the law affects harshly.”

He calls this process of dehumanization the “masks of the law.”

What Noonan meant by the masks of the law is the law’s ability to use rules and legal concepts to conceal persons who are treated harshly by the law.

He puts it this way:

“By masks in this context I mean ways of classifying individual human beings so that their humanity is hidden and disavowed.”

As you read *Roe* and *Casey* and the Court's abortion jurisprudence, have your radar set to locate any "masks of the law" used by the Court.

Link to Kermit Gosnell Grand Jury report

I am not assigning it, but I wanted to make sure you have a link to the Gosnell Grand Jury Report (cited in my article). It is sad but fascinating reading about late-term abortions in post-*Roe* America.

Gosnell Grand Jury Report

Gonzales v. Carhart

1. Notice that right off the bat Justice Kennedy and the Court employ a mask of the law by describing first trimester abortions being performed "most commonly by the physician vacuuming out the *embryonic tissue.*" (p. 609)

2. But this case is not about first trimester suction abortions, it is about second and third trimester "partial birth" abortions. This requires you to understand the difference between "D & E" abortions and "intact D & E" abortions. The latter is the type of abortion sometimes referred to as "partial birth abortions."

What is the difference between the two methods of surgical abortion"

Here is how the Court describes "D & E" abortions, the "usual abortion method" during the second and third trimester:

> After sufficient dilation the...doctor... inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart...A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety." (p. 609)

Here is how the Court describes the "intact D & E" or partial birth procedure:

> In an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart...Intact D & E usually involves piercing the fetul skull and evacuating its contents, however, because cervical dilation is insufficient to allow the fetus's head to pass once it becomes lodged in the cervix. P. 609

Again, notice the mask used in describing the procedure. What does it mean to "evacuate the contents" of an unborn child's skull?

Here is a nurse's more realistic description of the procedure as quoted by the Court in *Gonzales*:

> Here is another description from a nurse who witnessed the same method performed on a $26^{1/2}$-week fetus and who testified before the Senate Judiciary Committee:
>
> " 'Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—everything but the head. The doctor kept the head right inside the uterus ....
>
> " 'The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

> " 'The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp ....
>
> " 'He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.' " *Gonzales*, 550 U.S. at 138-139.

So the issue in *Carhart* is whether a law permitting the D & E procedure but prohibiting the intact D & E procedure imposes an undue burden on a woman's right to have a second trimester abortion?

To the extent that the law applies to post-viability issues, what is the issue under the doctrine of *Roe* & *Casey*?

3. Notice that the majority says that the issue is "whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child." p. 610 [Another use of a mask]

Notice Justice Ginsburg believes that the law is completely irrational, because it does not save "a single fetus from destruction." (p.616) What is her point? Is there a counter-argument?

The Court says that the law is an attempt by Congress to "use its voice and its regulatory authority to show its profound respect for the life within the woman." (p. 612) But again, Justice Ginsburg says stuff and nonsense--the Act simply says take the life in the womb by Method X but not by Method Y. How is that showing "profound respect" for life in the womb?

Maybe the real legitimate purpose is not the life of the unborn, but rather regulating the "integrity and ethics of the medical profession" by drawing a clear line between abortion and infanticide? (p. 612)

Is this consistent with *Casey*?

But if partial birth abortion of Baby Doe is similar to infanticide, why is a D & E abortion of the identical Baby Doe not similar to infanticide?

My Article on Kermit Gosnell and Roe v. Wade

If you are looking for a summary of *Roe, Casey & Gonzales* for this week's discussion, my article on Gosnell, *Roe* & the masks of the law (assigned with a link) gives you a detailed summary on p. 143-154.

Casey: Questions to Consider

In *Casey*, the Court was asked to overrule *Roe* (and at one time there were 5 votes to do so--Justice Kennedy switched sides at the last minute).

If the Court had overruled *Roe*, what would have been the effect?

In her law review article on the abortion liberty, Frances Olsen says something interesting: "Those who would leave the abortion issue to the state legislatures implicitly accept Roe's decision that the fetus is not a constitutional person." What is her point? Do you agree?

But Kennedy did switch and joined with O'Connor and Souter to reaffirm the "essential holding" of *Roe*. What is the essential holding that is now the law of the land under *Casey*?

Instead of a trimester approach, we get a 2-pronged approach. Now there is only one important line--that of viability. Pre-viabilty there is one rule, post-viability there is another rule.

I. **Pre-viability**

"The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*."(p. 597)

Prior to viability, the state may not impose an undue burden or substantial obstacle in the path of a woman seeking abortion. The state, however, may regulate pre-viability abortions so long as the regulation does not impose an undue burden on her right to choose abortion. Thus, so long as it does not impose an undue burden, the state "may take measures to ensure that that the woman's choice is informed." (p. 598)

The state may not prohibit pre-viability abortions, but it may attempt to "persuade the woman to choose childbirth over abortion." (P. 598)

So what about an informed consent requirement that requires the woman to be shown a 3D ultrasound of the unborn child she is carrying before an abortion may be performed? Constitutional under *Casey*? See p.598-599

II. **Post-Viability**

"[S]ubsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion **except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother**." p.598

III. **Fathers and Reproductive Autonomy**

Question: why did the spousal notification requirement in *Casey* violate the new rules written by the Court?

How is mere notification of her husband an undue burden on the woman's right to choose abortion.

"The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife." (p. 602)

So the husband's interest in the potential life he has helped to create is so slight that it does not even justify notification of his wife's decision to abort the child.

Is her absolute control over the decision to determine whether "potential life" becomes a child a "troubling degree of authority" over the reproductive autonomy of her husband?

What about the reproductive rights of men?

Should *Roe*'s reproductive autonomy liberty be extended to men?

Should men have a right to resist having an unwanted child imposed upon them?

Is it selfish for a young man to wish to be free of the emotional, social and financial burden's of parenthood?

Why not allow a father of a "potential life" to symbolically "abort" an unwanted child by declaring that he is unwilling to accept the burdens of being recognized as the father of the "potential life" his partner is carrying? The pregnant woman could still control whether to abort or give birth, but she could not thereby impose child support or other responsibilities of being a parent on her unwilling sexual partner. What are your thoughts?

Roe and History of Abortion Law and Science

Consider these items:

1. "Quickening--the mother's sense of fetal movement--was the first reliable evidence that the child was alive, and the [common] law depended on it. Why did the English common law prohibit abortion [only] after quickening? Because there was no reliable evidence that there was an existing child, or that it was alive, before quickening. When medical science challenged the quickening rule in the 1800s by showing that conception was the beginning of the life of a human being, states quickly moved to repeal the quickening rule and replace it with an abortion prohibition from conception." -- Forsythe, Abuse of Discretion at 108.

2. The original Hippocratic Oath, taken by doctors for centuries prior to *Roe*, said this: "I will give no deadly medicine to any one if asked, nor suggest any such counsel; and in like manner ***I will not give to a woman a pessary to procure an abortion***."

Important Passages from Casey

Here are some notable passages from the *Casey* "troika" opinion:

1. **The "Mystery of Life" passage**: *"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."* (p.595).

See also, *id*. (a few sentences below), in which the Court says that abortion is fraught with consequences, "*depending upon one's belief*, for the life or potential life that is aborted." The existence of human life in the womb, is not a question of scientific fact, but simply a matter of opinion or belief.

Justice Scalia's response to the "mystery of life" passage:

"I have never heard of a law that attempted to restrict one's "right to define" certain concepts; and if the passage calls into question the government's power to regulate actions based on one's self-defined "concept of existence, etc.," it is **the passage that ate the rule of law.**" (From his dissent in *Lawrence v. Texas*)

If we take this language seriously, where would it lead us? Is the Court saying that "personhood" is subjective, and thus each "person" should be

allowed to decide whether he is harming another "person?" May the law *ever* impose a definition of "personhood" on a "person" who wrongs another "person?" If so, when? Are all laws that restrict my "own concept...of meaning [and] of the universe" unconstitutional burdens on my "liberty?"

2. **The "we rule, you shut up and obey" passage.** This is the passage that has led some commentators to conclude that *Roe* is a super-precedent, one that may not be overruled: "Where the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present *whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution*." (partial excerpt p.596)

Has the Court ended the moral and political controversy over abortion? Did *Dred Scott* end the moral and political controversy over slavery? Should abolitionists have accepted the Court's "mandate" in *Dred Scott* and accepted slavery as a constitutionally protected property and liberty right of slave-owners? *Is* the abortion liberty "rooted in the Constitution?" Or is that exactly the point that makes the case so controversial?

3. **And, perhaps most importantly, this passage that tells us exactly why abortion is a liberty has been read into the Constitution:** "For two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." (p. 596).

What is the Court saying here?

4. How about the logic of this passage (deleted from current edition of casebook): The Court is defending the logical soundness of *Roe*'s recognition of a pregnant woman's SDP liberty to choose abortion--"The soundness of this prong of the *Roe* analysis is apparent from a consideration of the alternative. If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics...."

Hmmm. Let's think about this. If the Constitution doesn't protect a woman's right to choose to terminate the life of the unborn child she is carrying, then it follows that the state could compel her to have an abortion. Let's place

that reasoning into another situation and see if it works. Suppose Grutz Junior murders his father, Grutz Senior. He argues that the Constitution must recognize his right to choose to murder his father, because if it doesn't that means that the state could compel children to murder their fathers. Good argument? Or is it risible?

What is the real protection against state laws compelling women to have abortions?

First, the right of democratic self-government. Do you know *anyone* who would vote for a candidate running for public office on a pledge to make abortion mandatory?

Notice also that a law compelling abortion might directly violate the explicit provision in the Due Process Clause which forbids the taking of life without Due Process. The Constitution may be silent about privacy, reproductive autonomy, and abortion, but it is not silent about life.

Who is Jane Roe? Who is Mary Doe?

When reading *Roe v. Wade*, take a look at page 271 of the Paulsen book. The authors give you a short biography of Jane Roe (Norma McCorvey) and her incredible journey from pro-abortion activist to pro-life activist.

The Paulsen book does a nice job discussing *Roe v. Wade* on pages 270 to 278.

Mary Doe (Sandra Cano), the Plaintiff in *Doe v. Bolton*, decided not to have an abortion "once she felt her baby kick." She communicated this to her lawyer, but since her case was a class action her lawyer went ahead with the case anyway. See Clark Forsythe's book, Abuse of Discretion at p. 94

Glucksberg and the Two-Part Test For SDP Fundamental Rights

Issue: Whether Washington state's prohibition against "causing" or "aiding" suicide violates S.D.P. as applied to a mentally competent, terminally ill adult patient's right "to commit physician-assisted suicide."

Take a look at page 638 where the Court talks about the "established method of substantive-due-process analysis."

The Court says that the Plaintiff challenging a law as infringing a fundamental right under S.D.P. must meet a two-part test as a "threshold requirement" – P.639

First, he must show that the liberty he is asserting is **objectively** "deeply rooted in this Nation's history and tradition." (p. 638)

Second, a "careful description" of the "asserted fundamental liberty interest" (p. 638) is required to ensure that it is truly history and tradition that provide the guideposts for the Court's analysis and to "rein in the subjective elements that are necessarily present in due-process judicial review." (p.639)

So, in *Glucksberg*, we ask whether "suicide and assisted suicide" are deeply rooted in our history and traditions, and not whether "personal autonomy over intimate decisions affecting one's human dignity" is deeply-rooted. The second inquiry is simply too vague to produce accurate historical guideposts.

Notice however that a specific historical inquiry often may discover a fundamental right.

– Is the right to refuse invasive medical treatment deeply-rooted in our history and traditions? See P. 639

– How about the right of a terminally ill patient to obtain medical relief from intense pain and suffering, even if the pain medication might hasten death? See O'Connor concurrence at P.642-643

Apply *Glucksberg* to argument that S.D.P. protects a fundamental right to same-sex marriage?

Deeply-rooted?

Justice Kennedy on The Rule of Law and Obergefell

Here is a report of some remarks Justice Kennedy recently made at Harvard Law School:

> Justice Kennedy told students that public officials who object a law based on moral standing should resign from office rather than refuse to enforce it.
>
> The Supreme Court Justice also noted that it is mandated for

> government officials to "enforce a law that they believe is morally corrupt," even if they do face "difficult moral questions."
>
> He continued, "The rule of law is that as a public official in performing your legal duties you are bound to enforce the law."

So what is the Rule of Law and how does it differ from The Rule of Men?

Wikipedia defines Rule of Law:

> The **rule of law** is the legal principle that law should govern a nation, as opposed to being governed by arbitrary decisions of individual government officials. It primarily refers to the influence and authority of law within society, particularly as a constraint upon behavior, including behavior of government officials.[2] The phrase can be traced back to 16th century Britain, and in the following century the Scottish theologian Samuel Rutherford used the phrase in his argument against the divine right of kings.[3] The rule of law was further popularized in the 19th century by British jurist A. V. Dicey. The concept, if not the phrase, was familiar to ancient philosophers such as Aristotle, who wrote "Law should govern".[4]
> Rule of law implies that every citizen is subject to the law, including law makers themselves. In this sense, it stands in contrast to an autocracy, collective leadership, dictatorship, or oligarchy where the rulers are held above the law. Lack of the rule of law can be found in both democracies and dictatorships, for example because of neglect or ignorance of the law, and the rule of law is more apt to decay if a government has insufficient corrective mechanisms for restoring it. Government based upon the rule of law is called nomocracy.

Is *Obergerfell* a case under the Rule of Law or the Law of Rulers?

Even if the result is a good one as many of you no doubt believe, is it ever good for the Court to rule 320 million citizens from the Bench? Do the ends justify the means?

Lawrence v. Texas: Some Questions and Issues

1. Is the *Lochner* opinion almost identical to the *Lawrence* opinion (if we substitute the right of consenting adults to enter into sexual relationships for the right of adults to make contracts)?

Should *Lochner* be revived to strike down meddlesome laws interfering with freedom of contract? Minimum wage laws? Labor laws? Employment discrimination laws?

Does the 14th Amendment codify Mr. Vatsyayana's Kama Sutra?

Apparently it does. See p. 632 noting that the 14th Amendment does indeed protect the liberty of "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle." I would think it also protects the liberty of consenting adults to engage in sexual practices common to a heterosexual lifestyle. So that pretty much seems to cover the constitutional codification of the *Kama Sutra* or, at the very least, of both The Joy of Sex and The Joy of Gay Sex.

2. May a state make it a crime for a person to have a sexual relationship with more than one person. Suppose that Mr. A has 3 regular sexual partners--he sleeps with Ms. B on Mondays, with Ms. C on Wednesdays, and with his special sweetheart, Ms. D, on Saturdays. Under *Lawrence*, could a state make it a crime for someone such as Mr. A to have more than one ongoing sexual relationship? I would think not.

Now suppose Mr. A wants to make a permanent commitment to his three lovers--he "marries" all 3 of them in a religious ceremony at a church that is open to blessing plural marriages. May the state criminalize consensual polygamy under *Lawrence*? If A, B, C & D have a constitutional right to enter into a *plural uncommitted relationship*, doesn't it follow that they have a *right to make a more lasting consensual commitment to their consensual relationship*?

Suppose two adult brothers wish to engage in sexual conduct common to the homosexual lifestyle? Is this aspect of private sexual autonomy protected by *Lawrence*? What if an adult mother and her adult son enter into a consensual sexual relationship? Protected by the *Lawrence* liberty?

What about consenting adults who choose to enter into a sex-for-pay encounter? Is consensual prostitution protected by the liberty of sexual autonomy?

If not, why not? Which consensual adult sexual practices are protected by SDP and which are not?

3. Did the *Lawrence* Court recognize a new fundamental right to sexual autonomy for consenting adults under SDP? Did the Court apply strict scrutiny or a rational basis test in *Lawrence*? See p. 632: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

4. If public morality is no longer even a legitimate state interest, what is the constitutional standing of animal cruelty laws which make it a crime for a person to beat his dog or cat?

Notice Justice Kennedy's hubristic assertion on p. 632 about if only the Founders had "known the components of liberty in its manifold possibilities" they would have written a right to sexual autonomy into the text of the Constitution. Thoughts?

The Rule of Law and SDP

We hear a lot about the Rule of Law these days. But this is a term many in the legal profession use without first clearly defining it.

What is the Rule of Law? What is the difference between Lex Rex and Rex Lex? [The law is king vs. the king is law--the Rule of Law vs. the Law of Rulers or the Rule of Man]

Is the Supreme Court bound by the Rule of Law? Or is the Court, literally, "the law" no matter what it rules?

Lex Rex or SCOTUS Lex?

Was the Court's SDP decree in *Dred Scott* a part of the legitimate the Rule of Law? What was President Lincoln's view about *Dred Scott* as legitimate law?

What about *Lochner*? *Griswold*? *Roe v. Wade*? *Obergefell*?

What are your thoughts about whether the Rule of Law is binding on SCOTUS? Or is SCOTUS the law?

Equal Protection and Levels of Scrutiny: A Hypo

Assume the State of Nebraska wishes to have a State-sponsored Fourth of July pageant which would include a drama portraying the story of George Washington at Valley Forge.

Four actors try out for the part, which pays a stipend of $5000.

The first actor (A) is a tall, slender Black male.

The second actor (B) is a tall, slender White male who bears a remarkable resemblance to George Washington.

The third actor (C) is Danny DeVito, a short, rotund White male who bears no resemblance to George.

The fourth actor (D) is a White woman of average height and weight.

Assume all four actors have equivalent acting ability. Suppose the casting director, a state employee, hires B and informs A that he was rejected because of his race, C that he was rejected because of his size, and D that she was rejected because of her gender.

What are the constitutional law issues here under the Equal Protection Clause?

G'Kar of the Planet Narn

Ambassador G'Kar

Is Andreas Katsulas really a citizen of Narn?

Obergerfell and the Great Debate

As I said in class, I want you to read *Obergefell* not so much for its doctrine concerning same-sex marriage, but rather as the most recent boiling point in the Great Debate between original understanding originalism and the Living Constitution.

Please read the dissenting opinions as carefully as you read the majority opinion, because the dissenting opinions are almost completely focused on the role of the Court in applying vs. making constitutional law.

I will ask a goodly number of you to share your views on *Obergefell* and whether it is a legitimate judicial application of the Written Constitution.

I want everyone to think through his or her views of whether the definition of marriage is committed by the Written Constitution to the federal judiciary or to democratic self-government by we the people in the several states.

What would have happened with respect to the same-sex marriage issue if the Court had said under the 10th Amendment the states--not the Court--have the power to define marriage?

Ms and Ts

Lets focus on a governmental program intended to provide subsidized housing for economically needy people. The idea is to help only those who need help, so a line will have to be drawn somewhere to decide who gets housing benefits and who does not get housing benefits.

M (Ends or purpose of the law)--To help house needy citizens afford habitable housing

T(Means: the classification made by the law)--To draw a line based upon income (people on one side of the line get benefits, people on the other side of the line do not get benefits)

Loving v. Virginia: SDP and EPC

Notice that Virginia's racially discriminatory marriage law triggers strict scrutiny under two separate theories:

1. it is a classification that relates to a fundamental right under SDP (the right to marry);
2. it uses a suspect classification under the EPC (racial classifications are suspect).

Here is what the Court said about marriage as a fundamental right in *Loving*:

> *Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.*

Suppose a state prohibits short people (i.e. those under 5 foot tall) from marrying. What standard of review would apply when Danny DeVito sues to challenge the constitutionality of this law?

What about laws which refuse to recognize incestuous marriages between

adults (e.g., an adult son and his mother who wish to marry) or plural marriages among consenting adults? Does strict scrutiny apply to these denials of "marriage equality?"

Do we need a definition of "marriage" to apply the rule that the "right to marry" is a fundamental right?

If so, how did the Court define marriage in *Loving*? If fundamental rights are those deeply and objectively rooted in American history and tradition, what definition of marriage is "deeply rooted in American history and tradition?"

Loving v. Virginia: Originalism and Racial Segregation

Suppose Virginia is correct and the society which ratified the 14th Amendment accepted anti-miscegenation laws (laws segregating the races in marriage) as good public policy.

Must we reject the judicial philosophy of originalism in order to strike down the miscegenation law?

Not at all. Most (probably all) originalists would actually argue that original understanding originalism requires the result the Court reached in *Loving*.

Let's take a closer look at original understanding.

What is the primary thrust of the Equal Protection Clause--the primary value articulated there?

Racial Equality.

Virginia does not deny this--it merely argues that the framers believed that miscegenation laws were consistent with racial equality.

So even if Virginia is right, all it tells us is that two values were part of the original understanding--racial equality, and cultural acceptance of laws prohibiting inter-racial marriage.

But now let's assume that you are a judge committed to construing the Constitution in light of original understanding, and you are also a student of history, sociology, psychology, and the American culture.

Is the original Constitutional value of racial equality under law consistent with enforcement of anti-miscegenation laws?

Everyone I know would answer no, these two things are not consistent.

So you are faced with a choice--either to abandon the original constitutional principle of equality by allowing miscegenation, or forbid miscegenation in order to achieve equality. “X” and “not X”.

Since the values are inconsistent you must give up one or the other.

So what is an originalist Justice to do?

Since the primary original goal of the 14th Amendment (it's "one pervading purpose") was racial equality, since the principle of equality is expressly stated in the 14th Amendment and miscegenation is not, you must choose equality.

Here is how Bob Bork explains his view that a Justice committed to original understanding must vote to declare state-imposed racial segregation, in public schools or anywhere else, unconstitutional under the Equal protection Clause:

> *The Court's realistic choice, therefore, was either to abandon the quest for [racial] equality by allowing segregation or to forbid segregation in order to achieve equality. There was no third choice. Either choice would violate one aspect of the original understanding, but there was no possibility of avoiding that. Since [racial] equality and segregation were mutually inconsistent, though the ratifiers did not understand that, both could not be honored. When that is seen, it is obvious the Court must choose equality and prohibit state-imposed segregation. The purpose that brought the fourteenth amendment into being was equality before the law, and equality, not separation, was written into the text.*

Do you find this argument convincing?

Another way of looking at this is to say that the original principle of racial equality is binding on the Court, but not the subjective cultural and policy preferences of the founding generation.

Railway Express case: Ms and Ts

Let's practice our Ms and Ts on the Railway Express case on page 641.

Ends =M (mischief): Advertisements on trucks "constitutes a distraction to...drivers and pedestrians"

Means=T (trait or classification drawn): the law prohibited trucks from advertising the products of third persons but not products sold by the owner of the truck

In other words, advertising on A's trucks saying "buy B's widgets" was banned, but A's trucks could contain ads saying "buy My widgets."

Try to draw your M and T diagrams for this scenario.

Strict Scrutiny and Least Restrictive Means Element

U.S.A. TODAY 12-29-94

Clean-shaven, by computer

By Katherine Lotte, AP

PRISON PHOTO: A Hasidic rabbi who says a shave would violate his beliefs can keep his beard while serving a 12-year sentence. New York prison officials, who require a clean-shaven file photo, accepted a computer-generated image of what Shlomo Heibrans, 32, would look like without his beard. He was convicted of kidnapping after taking in a New Jersey bar mitzvah student who says he ran away from home seeking a more religious household.

Notice that most governmental interests are not compellingly important and, even if one is, under strict scrutiny the means must be necessary and narrowly tailored to advance that compellingly important governmental ends.

So consider the above from USA Today. The Rabbi was serving a 12-year prison sentence for kidnapping. Prison officials had a compelling interest in prison security to require a clean-shaven picture of the Rabbi. But the Rabbi's religious beliefs would not allow him to shave for the picture.

Is requiring him to shave necessary for the state to get its compellingly important picture?

Is there a least restrictive means of getting the picture without restricting his religious liberty?

How about a virtual shave using computer software to remove the beard from the picture on the left?

Strict scrutiny requires the state to pass through a gauntlet of superlatives before restricting a highly protected constitutional right or employing a suspect classification under EPC.

Real Rational Basis Review

The rational basis test requires only that the challenged law be rationally related to a legitimate state interest.

Williamson (p. 671) and *Beach Communications* (p. 672) demonstrate how deferential is rational basis review.

The Court will uphold the law "if there is any reasonably *conceivable* state of facts that would provide a rational basis." (p. 673)

There need only be "plausible reasons" (not actual reasons) for the law. (p. 673)

The law comes "bearing a strong presumption" of constitutionality. (p. 674)

Those attacking the law must negative "every conceivable basis which might support it." Id.

The Court is especially deferential to the process of legislative line-drawing, even where those on the wrong side of the line "have an almost equally strong claim" to those on the right side of the line. Id. Line-drawing is a "matter for legislative, rather than judicial, consideration." Id.

The "precise coordinates of the resulting legislative judgment [are thus] virtually unreviewable." Id.

Legislation may proceed "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." (p. 671)

This is why a case like *Lawrence*, although purporting to apply rational basis review, appears to be something else--rational-basis-with-a-bite, or perhaps medium rare scrutiny or even something more strict.

Plessy v. Ferguson: The Living Constitution Decrees Racial Segregation

If, as the *Slaughter-House* decision makes clear, the original meaning of the Equal Protection Clause was to prohibit laws which required racial segregation and discrimination "against the negroes as a class, or on account of their race," then *Plessy* is not an originalist decision. *See* Justice Harlan's originalist dissent in *Plessy*.

Rather, the Court in *Plessy* is acting like a common law court construing the Equal Protection Clause as evolving to meet the needs of the White-supremacist majority of Louisiana in 1896 to legislate based upon their "social prejudices." The Equal Protection Clause requires complete racial equality, but the Living Constitution of *Plessy* reads "separate but equal" into equal protection.

The Living Constitution can produce any result that a majority of the Court desires, anything form your wildest dreams of good policy to your darkest nightmares of bad policy. And whatever the Court says is then entrenched in the Constitution for generations. *Plessy* was the "law of the land" for over half a century.

Combat Exclusion: Is Gender a Good Proxy for Warrior?

In *Rostker*, the Court concluded that a male only draft registration was justified because, since women are excluded from combat, gender is substantially related to the important interest of having a supply of combat-eligible young men ready to be called up quickly in the event of war.

But doesn't that beg the question? Is the combat exclusion of women unconstitutional under the Equal Protect Component of the Due Process Clause of the Fifth Amendment? Is gender a good proxy for combat fitness in the modern, high tech military?

Gender Classifications: From Reed to VMI

Here are a few notes and questions on these cases:

1. *Reed* v. *Reed*--the Court purports to be applying the rational basis test, but did it? Is this a good example of "medium rare" scrutiny in which the Court pays lip service to the rational basis test but in reality applies a heightened form of scrutiny? Suppose, for example, that a state were to legislate a preference for the *older* of otherwise equally-entitled heirs to be named the administrator of an intestate's estate? Do you think this "arbitrary" age classification violates the EPC?

2. Notice that in *Frontiero* a plurality (but not a majority) wished to treat gender as a suspect classification entitled to strict scrutiny. If this had succeeded, would public schools and state universities be allowed to

maintain separate but equal athletic programs for men and women? What would happen if a school had, say, only one team in each sport and selected players based upon athletic ability? How many women would make the basketball team? The baseball team? The soccer team? The football team? The tennis team? The track team? Could the state maintain separate men's and women's prisons?

3. *Craig* v. *Boren* held that gender is a quasi-suspect classification reviewed under intermediate scrutiny? Thus, when a state legislates a gender classification it must be prepared to defend it by showing that the gender line is *substantially related* to the advancement of *important* governmental objectives. In *Craig*, Oklahoma used gender as a proxy for responsible drinkers/drivers--kind of like sugar and spice and everything nice for young women, and untrustworthy, irresponsible, drunk drivers for young men! How accurate is this proxy as a means of screening out drunk drivers? As Justice Stevens pointed out, it "is not totally irrational." There was *some* statistical evidence to support it. It might be good enough for rational basis review, but is gender "substantially related" to drinking and driving? Is it overinclusive? Underinclusive? Both overinclusive and underinclusive?

4. *Rostker*--the Court says gender is substantially related to draft registration because the purpose of the draft is to prepare for combat and, since women are excluded from combat, it makes perfect since to exclude women from the draft. Hmmm. Makes sense, no? Of course, the validity of the draft exclusion depends upon the validity of the combat exclusion. Is the combat exclusion based upon an obsolete gender stereotype of men protecting women from common enemies? Is there a warrior gender and a "keep-the-home-fires-burning" gender? Who would you rather have protect you from the enemy--Xena or Woody Allen? Is this warrior/non-warrior stereotype overinclusive? Underinclusive? Both? Is Rostker still good law now that the combat exclusion has been rescinded and women are eligible for combat assignments?

5. *United States* v. *Virginia*--did the Court apply intermediate scrutiny or "medium well done" scrutiny in this case? Does a state university have a compelling interest in educational autonomy, an interest that includes the right to admit students that best serve the school's educational objectives? Or should federal courts decide issues concening the school's educational mission and which students best serve the school's educational ideals? Does Justice Ginsburg try to have it both ways in her majority opinion? She says gender cannot be used to exclude "women who have the will and capacity" to participate in VMI's "citizen-soldier" educational program. But she also seems to say that VMI must "adjust aspects of the physical training programs." (p. 747, n.19) If "some women" are equally qualified for VMI's

military training, why do these qualified women need the school to "adjust (by which Ginsburg means lower) the school's physical training standards?

6. Here is the "law" coming out of the VMI case:
--The burden of establishing the "exceedingly persuasive" justification for use of gender classifications is "demanding" and "rests entirely on the State." (p.744)
--the State must show "at least that the [gender]classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'" (id.)
--"the justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." (id.)
--"And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." (id.)
This demanding scrutiny (medium well? intermediate scrutiny on steroids?) is why I think the combat exclusion and draft exclusion would be difficult to justify should they be challenged today under *U.S.* v. *Virginia.* Try to justify the combat exclusion without resorting to overbroad generalizations about the ability of most women to carry 150 pound backpacks or kill the enemy in close combat. As Justice Ginsburg said, "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." (p. 747)

Gender-based Income Tax Rates

Following *Kahn* (p.777) and *Califano* (p.780), could Congress enact a gender-based income tax rate under which men are taxed at a higher rate than women (e.g. top marginal rate for women 25% and for men 30%). Suppose Congress did so for the purpose of reducing "the disparity in economic condition between men and women" caused by the long history of societal discrimination against women?

What about a race-based income tax rate (non-whites 25%, whites 30%). Constitutional?

Califano

To give you an idea of how the Social Security formula discriminated in favor of women, let's assume I decide to base grades in Con Law on your

score on 10 pop quizzes. And suppose further I decide that, in order to compensate for past societal discrimination against women in the law, I will allow women--but not men-- to throw out their three lowest scores.

So assume Mr. A and Ms. B have identical records on their quizzes--they each scored 100% on seven quizzes and 0% on three quizzes. What grades do they earn under my grading formula?

Mr. A has an average of 70% and that might curve out at a 4 or 5.

Ms. B has an average of 100% (after throwing out her three zeroes) and earns a grade of 9 for the course.

If I chose to grade on this system at a state university, would it violate the EPC?

Should I adopt this formula for future classes?

How would a social conservative like Pat Robertson, who wishes to encourage women to stay home and care for their young children, feel about the Social Security formula in *Califano*?

Nebraska Civil Rights Initiative

In 2008, the People of Nebraska passed the Nebraska Civil Rights Initiative which amended the Nebraska Constitution (by adding art I, section 30) to eliminate racial preferences:

> **I-30. Discrimination or grant of preferential treatment prohibited; public employment, public education, or public contracting; section, how construed; remedies.**
> (1) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. (2) This section shall apply only to action taken after the section's effective date. (3) Nothing in this section prohibits bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting. (4) Nothing in this section shall invalidate any court order or consent decree that is in force as of the effective date of this section. (5) Nothing in this section prohibits action

that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state. (6) For purposes of this section, state shall include, but not be limited to: (a) the State of Nebraska; (b) any agency, department, office, board, commission, committee, division, unit, branch, bureau, council, or sub-unit of the state; (c) any public institution of higher education; (d) any political subdivision of or within the state; and (e) any government institution or instrumentally of or within the state. (7) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Nebraska's antidiscrimination law. (8) This section shall be self executing. If any part or parts of this section are found to be in conflict with federal law or the Constitution of the United States, this section shall be implemented to the maximum extent that federal law and the Constitution of the United States permit. Any provision held invalid shall be severable from the remaining portions of this section.
Source: Neb. Const. art. I, sec. 30 (2008); Adopted 2008, Initiative Measure No. 424

Grutter: Some Issues to Think About

- Justice Kennedy in dissent says "The Court ...does not apply strict scrutiny." Is he correct?
- What is the difference between a permissible "critical mass" and a forbidden "quota"? What is the difference between the permissible "racial plus" in *Grutter* and the impermissible racial "20 points" in *Gratz*?
- What about less restrictive means of getting a racially-diverse class? Why shouldn't Michigan Law School decide on *minimum qualifications*

for law students and then use a race-neutral lottery to select a class from this very large pool of minimally-qualified (as opposed to highly-qualified) applicants? Is maintaining its status as an "elite" law school a compelling state interest? How so? Does Michigan want to have it both ways--to use a very high standard of qualifications to select roughly 80% of its law school class (even though almost no minorities are admitted under this standard of merit) and then use race as a "determinative factor" or as an "extremely large" factor in selecting the other 20% of its class?

- The Court says that the Law School's "race-as-a-plus" admissions program does not **unduly harm** members of any racial group." What does that mean? If a "critical mass" of the seats in the class are determined by the use of a large racial plus, doesn't this necessarily mean that non-preferred students, who would have been admitted had others not received a large racial plus, are seriously harmed by losing out on an educational and career opportunity? The Court says that since all students are considered on an individualized basis and race is only used as one factor, the program is fair and does not unduly harm non-minority students. Do you buy this? If "but for" the racial plus given to B, A would have been admitted instead of rejected, hasn't A suffered a serious race-based harm? Is this "fair?" How so?
- In *Gratz*, Justices Breyer and Ginsburg argued that "government decisionmakers may properly distinguish between policies of inclusion and exclusion." (p. 820-821). Do you agree? If admissions offers are limited, and if A is preferred over B for a scarce seat in the class on the basis of A's race, is it not true that B has been excluded on the basis of her race? In another words, if race is the basis of assigning a place in the class, is it not true that to include A is necessarily to exclude B? Is this not just the cold logic of scarcity and racial preferences?
- If you oppose racial preferences, are you willing to live with a law school student body that has few or no members of racial and ethnic minority groups? If not, what is your solution or plan?
- I remember a few years ago a supporter of racial preferences said "we are going to get racial equality in this country even if it means sacrificing an entire generation of white children." What do you think he meant? Is this a little like Justice O'Connor saying that there must be a durational limitation of, roughly, 25 years on racial preferences in admissions? Since racial preferences have already been in force for at least 30-40 years [*DeFunis* was decided in 1974 and *Bakke* in 1978], we should probably be talking about 2-3 generations, not just 1 generation. Is this a price worth paying? How do you explain to "white children" whose dreams are taken for this "sacrifice" that this is a fair and good policy? The recent case involving Harvard's affirmative action admissions process suggest that Asian-American students may bear much of the cost of racial preferences.

- Which minority students are more likely to benefit from affirmative action preferences in law school and medical school--those from poor families or those from more affluent families? Which white students are more likely to lose opportunities due to being on the wrong side of racial preferences--those from affluent families or those from poor or working class families?
- I recently heard a law professor give a presentation in which she argued that an African-American student from an upper income family (e.g., both parents lawyers or doctors) is more deserving of a large scholarship than is a white student from a humble economic background? Her point was that diversity means more than an offer of admission; it also means recruiting minority students to accept the school's offer of admission, and that may mean giving large racially-exclusive scholarships even to wealthy minority students. Is this just an application of Economics 101 and its teaching about supply and demand--the scarcity of a commodity increases its price--and thus minority applicants are "worth" more (precisely because of their race) than non-minority applicants and thus deserve large racially-based scholarships without regard to need? Is this fair? Should it be constitutional?

Racial Preferences vs. Other preferences

Some commentators have made a good point concerning racial affirmative action, and I want to follow up on it.

They have noted that in *Grutter* some white students were admitted with lower grades and test scores than some of the minority students who benefited from the "racial plus" factor. Although the opinion did not make clear how this happened, it is probably because these under-qualified white students received "donor" preferences or "alumni legacy" preferences or some similar type of VIP treatment. So if these kinds of preferences are okay, then why aren't affirmative action preferences also okay?

Let's assume a plaintiff walks into our law office and tells us that her application to attend Michigan Law has been rejected even though less qualified students were admitted under alumni, donor and racial preferences. What is our legal advice about the strength of her constitutional claims against these three types of preferences?

What standard of review applies to alumni preferences (i.e. to admission standards that discriminate in favor of children of alumni)?

What standard of review applies to donor preferences?

What standard of review applies to racial preferences?

What is your advice to your client about which claims stand a reasonable chance of success?

Now the "fairness" point--as opposed to the legal point-- is a little bit different. It might go something like this: "Since alumni and donor preferences tend to reward whites as a class, then what's wrong with racial affirmative action preferences that favor non-whites as a class?"

The problem with this kind of reasoning is it ignores the principle that equal protection is an individual right, not a group right. Our client is an individual citizen of the United States, not a representative of her race. Since she has not been admitted to the law school, by definition she has not benefited from the alumni or donor preferences. She has been harmed by all three preferences, and it makes no sense to say that because it is constitutional to harm her by preferences one & two, then it must also be okay to harm her by preference number three as well. In other words, the fact that our client has been harmed by two legal but unfair preferences, does not make it fair to harm her a third time or justify forbidding her from litigating her right to racial equality (and racial fairness) under the EPC. Or am I wrong?

Croson & Adarand

We will spend our class time discussing *Grutter* and *Gratz*, but here are some quick points about the doctrine of *Croson* and *Adarand (note--page references are to earlier edition of casebook--some of these passages have been edited out of current edition of casebook, but they remain in US Reports)*:

1. The rule: "[A]ll government action based on race …should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed….Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." p. 777
2. Although race can be used as a remedy to correct racial discrimination, only actual, "identified discrimination" counts. If the

purpose is to provide a remedy for past "societal discrimination" as opposed to actual "identified discrimination," the purpose is "an inadequate basis for race-conscious classifications." p. 768-769

3. Although statistics may be used to establish actual "identified" discrimination, "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." p. 769 What is the relevant statistical pool to look for evidence of racial discrimination by, say, an elite law school like UMich? All college graduates? All college graduates with high GPAs and high LSAT scores?
4. Narrow tailoring means the remedy may not be overinclusive compared to the magnitude of the identified discrimination. p. 769-770
5. Remember strict scrutiny also requires least restrictive means. Racial classifications must be the last resort, not the first resort. Racial classifications are appropriate only in "extreme cases" (p. 770) and only after the state has considered the use of race-neutral means to accomplish its objectives. p. 770
6. "Classifications based on race carry a danger of stigmatic harm.... [T]hey may in fact promote notions of racial inferiority and lead to a politics of racial hostility." p. 767 What kind of stigmatic injury? Are racial preferences for education and employment similar to a "handicap" in a sport like golf? Suppose my golf handicap is 40, and I shoot an actual score of 100. After subtracting my 40 stroke handicap, I announce that I have shot a 60. Do you think of me as a legitimate 60 golfer? When I beat Tiger Woods in a tournament (he shot a straight 61) by adjusting my actual score and subtracting my handicap, does anyone believe that I have earned my victory or that my golf ability is comparable to that of Tiger, the guy I "defeated"? Is this what Justice Thomas was referring to in his concurring opinion in *Adarand* (p. 778-779)?
7. Scalia at p. 802-803 (current casebook): "To pursue the concept of racial entitlement--even for the most admirable and benign of purposes--is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. ***In the eyes of government, we are just one race here. It is American.***"